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## Can't Stomach the Americans with Disabilities Act? How the Federal Courts Have Gutted Disability Discrimination Legislation in Cases Involving Individuals with Gastrointestinal Disorders and Other Hidden Illnesses

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# CAN'T STOMACH THE AMERICANS WITH DISABILITIES ACT? HOW THE FEDERAL COURTS HAVE *GUTTED* DISABILITY DISCRIMINATION LEGISLATION IN CASES INVOLVING INDIVIDUALS WITH GASTROINTESTINAL DISORDERS AND OTHER *HIDDEN ILLNESSES*

Lawrence D. Rosenthal<sup>+</sup>

## I. INTRODUCTION

The Americans with Disabilities Act (“ADA” or “the Act”)<sup>1</sup> was meant, in part, to help individuals with disabilities compete in the workplace.<sup>2</sup> By prohibiting employers from discriminating against individuals with disabilities,<sup>3</sup> and by requiring employers to affirmatively accommodate

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1. The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

2. See *id.* § 12101(b). Although there are several titles in the Americans with Disabilities Act, Title I of the ADA expressly prohibits employers from discriminating against employees or potential employees with respect to hiring, firing, compensating, and providing other terms, conditions, and privileges of employment. *Id.* § 12112(a).

3. See 42 U.S.C. § 12112(a). Specifically, Section 12112(a) provides: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* See also Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (2000). This Act applies to employers and programs receiving federal assistance. *Id.* The substantive provision of the Rehabilitation Act provides the following:

No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

individuals with disabilities, the ADA was a landmark piece of legislation enacted to benefit the forty-three million Americans who suffered from disabilities.<sup>4</sup> However, the optimism that originally accompanied this Act<sup>5</sup> has been shattered by the Supreme Court's decisions limiting ADA coverage.<sup>6</sup> Additionally, although some people with "obvious" disabilities are still receiving some protection under the Act,<sup>7</sup> it has become clear that many people who have "hidden" illnesses are not benefitting from this legislation.<sup>8</sup>

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*Id.* § 794(a).

4. 42 U.S.C. § 12101(a)(1).

5. See President George H. Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990) *available at* <http://www.eeoc.gov/ada/bushspeech.html>. At the signing of the ADA, President Bush observed, "With today's signing of the landmark Americans for [sic] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom." *Id.*

6. See, e.g., *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (holding that an employer is allowed to refuse to hire an individual if that individual poses a "direct threat" to self); *US Airways, Inc., v. Barnett*, 535 U.S. 391 (2002) (holding that an employer is not required to violate its seniority system to accommodate an employee requesting a reasonable accommodation); *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184 (2002) (holding that when determining whether an individual is substantially limited in the ability to perform manual tasks, the court must look at those tasks that are central to everyday life, and commenting that there needs to be a "demanding standard" for a plaintiff to qualify as being disabled); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that mitigating measures must be taken into account when determining whether an individual suffers from a disability under the Act); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (following *Sutton* and concluding that mitigating measures must be considered when determining whether an individual suffers from a disability under the Act); *Albertson's, Inc., v. Kirkingburg*, 527 U.S. 555 (1999) (holding that a body's internal mechanisms that compensate for an individual's physical limitations must be evaluated when determining whether that individual suffers from a disability under the Act).

7. See, e.g., *Stone v. City of Mount Vernon*, 118 F.3d 92 (2d Cir. 1997). In *Stone*, the court found that genuine issues of material fact existed regarding whether the employer could have accommodated a paralyzed firefighter by assigning him to a position within the fire department that did not require fire suppression as an essential job function; therefore, the court reversed the lower court's granting of summary judgment in favor of the employer. *Id.* at 100-01.

8. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (noting the prevalence of pro-defendant outcomes under the ADA); Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) (comparing the success rates of plaintiffs and defendants in employment discrimination cases). See also Kevin M. Clermont, Theodore Eisenberg, and Stewart J. Schwab, *Advantage to the Defendant: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts*, Presentation for the Association of American Law Schools, Jan. 5, 2003 (demonstrating that plaintiffs who appeal pro-employer outcomes are much less likely to prevail than defendants who appeal pro-employee outcomes); EEOC Website at <http://www.eeoc.gov/stats/ada-changes.html> (last visited Oct. 1, 2003) (providing information on the number of EEOC merit resolutions of ADA claims involving all types of disabilities).

One trend that has developed at all levels of the federal court system demonstrates that individuals suffering from gastrointestinal disorders, more specifically ulcerative colitis<sup>9</sup> and Crohn's disease,<sup>10</sup> have been unsuccessful when pursuing claims under the ADA.<sup>11</sup> These individuals face a difficult position in that courts conclude either that they are not "sick enough," and therefore do not have a disability under the ADA, or that these individuals do have a disability, but are "too sick" to perform the essential functions of their jobs with a reasonable accommodation.<sup>12</sup> Perhaps because these diseases are not accompanied by "obvious" symptoms (such as blindness, deafness, or mobility impairments), and perhaps because these employees are not seen as people with disabilities, the sufferers of these "hidden" illnesses face an uphill battle when attempting to pursue a disability-based discrimination claim. Despite the "hidden" nature of these diseases, most of the people who suffer from these illnesses need the protection of a federally legislated remedy such as the ADA.

This Article will first address the nature of these "hidden" gastrointestinal diseases and the various treatment options available to those who suffer from them. The Article will then analyze many cases from the various federal courts in which sufferers of these illnesses have attempted to use the ADA or the Rehabilitation Act<sup>13</sup> to recover for the adverse employment actions they experienced. This section of the Article focuses on the "not sick enough" and "too sick" dilemmas.

After addressing the cases in which the plaintiffs were either "not sick enough" or "too sick," the Article then highlights some of the other

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9. See HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1679 (Eugene Braunwald et al. eds., 15th ed. 2001) (1958) [hereinafter HARRISON'S] (stating that colitis is similar to Crohn's disease and is classified as an inflammatory bowel disease). Unlike Crohn's disease, which can occur anywhere within the gastrointestinal tract, colitis, as the name suggests, occurs primarily in the colon and in the rectum. *Id.* at 1681.

10. See *id.*, at 1679-81. This condition, along with ulcerative colitis, can be classified as an inflammatory bowel disease, which affects any part of the gastrointestinal tract, but most commonly exists in the small or the large intestine (or both). *Id.*

11. See Colker, *A Windfall for Defendants*, *supra* note 8; Colker, *Winning and Losing Under the ADA*, *supra* note 8. This is not unique to individuals with gastrointestinal disorders. See *id.* In fact, most ADA plaintiffs have not been successful when pursuing these claims. *Id.* Additionally, even people diagnosed with colon cancer have not always experienced success in pursuing their ADA claims. See *Dinsdale v. Foresman-Addison Wesley*, 10 ADA Cases 1400, 2000 U.S. Dist. LEXIS 12015 (N.D. Iowa Apr. 13, 2000).

12. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2000). In order to receive protection under the ADA, a plaintiff must not only suffer from a disability, but he must also be a "qualified individual with a disability," which is defined as "an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.*

13. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (2000).

problems these plaintiffs have faced when attempting to assert ADA claims—problems which occurred either at the initial stage of the litigation or after the plaintiffs had achieved some success at the lower court. Next, this Article will address some cases in which plaintiffs with these illnesses achieved some success, although for the most part, these successes occurred at the very preliminary stages of litigation. Finally, this Article will suggest some solutions to this problem and will recommend how plaintiffs with these gastrointestinal illnesses (and other “hidden” illnesses) could obtain some type of legal relief.

This Article demonstrates that despite the initial optimism behind the ADA, many of the people who need the protection of the Act have not been able to access that relief. This Article’s purpose is *not* to argue that *every* individual with colitis, Crohn’s disease, or any other “hidden” illness is entitled to prevail on an ADA claim. However, this Article demonstrates that people with these illnesses face an uphill battle when attempting to apply for relief under the ADA, and that the current interpretation and application of the ADA severely restrict the number of individuals who achieve success under the Act. Unless, and until, either Congress acts to limit the courts’ conservative interpretation of the ADA, or the courts change the pro-employer interpretation of the ADA, the “once-closed doors” to which President Bush referred when signing the ADA into law will remain closed and secured with a very strong lock.<sup>14</sup>

## II. A BRIEF OVERVIEW OF ULCERATIVE COLITIS AND CROHN’S DISEASE

Although individuals suffer from many different types of gastrointestinal disorders, this Article will focus on two major types of disorders that fall under the category of inflammatory bowel diseases: ulcerative colitis and Crohn’s disease. Although both have similar symptoms, the two diseases are very different.<sup>15</sup> Two traits they do share, however, are that both diseases affect the victim’s gastrointestinal tract, and both vary in severity from mild to severe.<sup>16</sup>

The phrase “chronic intestinal inflammation” describes both diseases.<sup>17</sup> While colitis, as the name suggests, occurs in the colon,<sup>18</sup> Crohn’s disease

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14. See Bush, *supra* note 5.

15. HARRISON’S, *supra* note 9, at 1679-92.

16. *Id.* Although not typically fatal, some cases of Crohn’s disease can result in death. *Id.* at 1684. For example, in a case that received some press attention four years ago, the wife of major league baseball player Graeme Lloyd died as a result of Crohn’s disease. See Mike Ulmer, *Lloyd’s Wife Loses Quiet Fight with Crohn’s*, TORONTO SUN, Apr. 4, 2000, Sports sec., at 7.

17. HARRISON’S, *supra* note 9, at 1679.

18. *Id.* at 1681. Colitis can also affect the rectum. *Id.*

can occur anywhere within the digestive tract, but most commonly arises in the small intestine, the large intestine, or both.<sup>19</sup> Due to the nature of these conditions, people suffering from colitis or Crohn's disease typically experience abdominal pain, weight loss, fever, bleeding, persistent diarrhea, and skin or eye irritations.<sup>20</sup> These conditions normally are not curable,<sup>21</sup> and sufferers of these conditions usually undergo one or more surgeries in an attempt to alleviate their symptoms.<sup>22</sup>

Although the exact number of people suffering from these illnesses is unknown, some researchers conclude that as many as one million Americans suffer from these two types of inflammatory bowel diseases.<sup>23</sup> Other estimates put the rate of ulcerative colitis at eleven out of every one hundred thousand Americans, and the rate of Crohn's disease at seven out of every one hundred thousand Americans.<sup>24</sup>

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19. *Id.*

20. *Id.* at 1682-84. Additionally, children with these illnesses can experience possible delayed growth and sexual maturation. Introduction to Crohn's Disease, Crohn's & Colitis Foundation of America, at <http://www.ccfa.org/medinfo/medinfo/aboutcd.html> (last visited Oct. 2, 2003).

21. See Surgery for Crohn's Disease, Crohn's & Colitis Foundation of America, at <http://www.ccfa.org/medinfo/medinfo/surgerycd.html> (last visited Oct. 2, 2003); Surgery for Ulcerative Colitis, Crohn's & Colitis Foundation of America, at <http://www.ccfa.org/medinfo/medinfo/surgeryuc.html> (last visited Oct. 2, 2003).

22. HARRISON'S, *supra* note 9, at 1690. See Surgery for Crohn's Disease, *supra* note 21; Surgery for Ulcerative Colitis, *supra* note 21.

23. Introduction to Crohn's Disease, *supra* note 20.

24. HARRISON'S, *supra* note 9, at 1679. Research has indicated that the incidence rates of these diseases vary with geography, ethnicity, socio-economic class, race, and whether an individual smokes. *Id.* With respect to geography, countries located in the north, such as the United States, the United Kingdom, and the Scandinavian countries have the highest rates of these illnesses. *Id.* Unlike the previously identified countries and regions, southern European countries, Australia, and South Africa have considerably lower rates of colitis and Crohn's disease. *Id.* Additionally, these diseases are extremely rare in Asian and South American countries. *Id.* In addition to geography, ethnicity and religion also appear to be variables associated with these diseases. *Id.* For example, in the United States, Europe, and South Africa, Jewish people have a two- to four-fold increase in the frequency of ulcerative colitis and Crohn's disease. *Id.* Also, research has shown that the frequency of these illnesses is lower in African-Americans, Hispanics, and Asians than it is in Caucasians. *Id.* Also, urban areas have higher incidence rates than rural areas, while people in higher socio-economic classes suffer from these diseases at a higher rate than individuals in lower socio-economic classes. *Id.* These diseases also tend to affect family members, with higher incidence rates among first-degree relatives and the children of parents with the diseases than among people without a family link to these illnesses. *Id.* One other interesting fact about both of these illnesses is that sufferers of both ulcerative colitis and Crohn's disease experience an increased risk of colon cancer. *Id.* at 1691-92. See *Hobson v. Raychem Corp.*, 73 Cal. App. 4th 614, 619-20 (Cal. Ct. App. 1999). In *Hobson*, the plaintiff alleged that her ulcerative colitis "dramatically increases the risk of colon cancer." *Id.*

Unfortunately for sufferers of colitis and Crohn's disease, the chances of "curing" these conditions (especially Crohn's disease) are not good.<sup>25</sup> Nonetheless, there are some treatment options available, ranging from medication to surgery.<sup>26</sup> Many of the medicines used to treat these diseases have side effects themselves, and are thus not harmless forms of treatment.<sup>27</sup> The following five types of medicine treat these diseases: (1) corticosteroids;<sup>28</sup> (2) aminosalicylates;<sup>29</sup> (3) antibiotics;<sup>30</sup> (4)

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25. See Surgery for Crohn's Disease, *supra* note 21; Surgery for Ulcerative Colitis, *supra* note 21. One "cure" for ulcerative colitis is the complete removal of the colon and the rectum. *Id.* Although this solves the patient's initial problem, this procedure can cause other complications. *Id.*

26. HARRISON'S, *supra* note 9, at 1687-91.

27. Types of Medications, Crohn's & Colitis Foundation of America, at <http://www.ccfa.org/medinfo/medinfo/medications.html> (last visited Oct. 2, 2003). See Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (indicating that the side effects of medications must be taken into account when determining whether an individual has a disability under the Act). Specifically, the Court stated:

Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of these measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.

*Id.*

28. Corticosteroids and aminosalicylates both work as anti-inflammatory agents to control the symptoms of both colitis and Crohn's disease. Types of Medications, *supra* note 27. Patients take these medications either orally or rectally (in some cases, the corticosteroids can be administered intravenously), and these medications have been successful in controlling the symptoms of these diseases. See *id.* However, like many medications, these treatment options do have side effects. *Id.* While the side effects of the aminosalicylates are not particularly severe or dangerous, the side effects of the corticosteroids used to treat these diseases can be extremely harmful. *Id.* Specifically, corticosteroids can result in osteoporosis, cataracts, stretch marks, weight gain, diabetes, hypertension, and psychiatric symptoms. See, e.g., Hardy v. Village of Piermont, 923 F. Supp. 604, 605-06 (S.D.N.Y. 1996) (describing the case of a plaintiff who used corticosteroids to treat her Crohn's disease and became unable to perform the essential functions of her job as a police officer because the medication she used caused severe weakness in both of her tibias, which prevented her from walking or running long distances). Additionally, because it is dangerous to quickly stop using corticosteroids, patients using corticosteroids need to be slowly weaned from these medications. Types of Medications, *supra* note 27. As a result of these side effects of corticosteroids, many patients are reluctant to use them. See Tangires v. The Johns Hopkins Hosp., 79 F. Supp. 2d 587 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000) (determining that, because the plaintiff refused to take the steroids prescribed to her on account of their potential side effects, the plaintiff did not have a disability within the meaning of the ADA). Fortunately for victims of these illnesses, there has been some development of a new class of corticosteroids. These new medications do not have many of these dangerous side effects. Types of Medications, *supra* note 27.

29. See *supra* note 28.

30. Types of Medications, *supra* note 27. Physicians prescribe antibiotics to control these illnesses, despite the fact that researchers have not yet identified any particular infectious agent that causes colitis or Crohn's disease. *Id.* These drugs, however, primarily treat Crohn's

immunomodulators;<sup>31</sup> and (5) biologic therapies.<sup>32</sup> Physicians prescribe these medications to induce and maintain remission, and to improve the quality of a patient's life.<sup>33</sup>

If none of the above-mentioned medical treatments is able to control the effects of colitis or Crohn's disease, surgery remains an option.<sup>34</sup> If a person suffers from "extensive chronic" colitis, a fifty percent chance exists that he will need surgery within ten years of the initial diagnosis.<sup>35</sup> Various types of surgeries treat both illnesses, ranging from removal of the entire colon and rectum to the removal of part of the intestine and resecting the remaining part.<sup>36</sup> A complete removal of the colon and rectum requires the patient to use an external appliance attached to his abdomen to collect the body's waste;<sup>37</sup> obviously, most patients do not find this option particularly appealing.<sup>38</sup> In the second option, surgeons are able to create an internal

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disease and not ulcerative colitis. *Id.* Like many other medications, antibiotics also have unpleasant side effects. *Id.* Specifically, studies indicate that people taking these medications experience nausea, headache, and loss of appetite. *Id.*

31. *Id.* The use of these drugs, which suppress the body's immune system, has successfully treated people with colitis and Crohn's disease. *Id.* This treatment has been used since the 1960s, again with some success and potentially harmful side effects. *Id.* Specifically, the use of these drugs can cause bone marrow toxicity, infection, inflammation of the liver, and lymphoma. *Id.* Additionally, because suppressed bone marrow can lead to low levels of marrow-producing blood cells, patients on these medications typically must undergo monitoring throughout their use of these drugs. *Id.*

32. Most recently, the United States Food and Drug Administration approved Infliximab, which is the first biologic therapy for Crohn's disease. *Id.* This treatment, which is administered intravenously, has achieved some success in treating active Crohn's disease, without causing many negative side effects. *Id.* Although this type of medication has been successful in treating Crohn's disease, not all suffers of the disease are able to afford this treatment, which is extremely expensive and is administered in eight-week intervals. See Williamson Group: New Drug Alert—Remicade, at <http://www.williamsongroup.com/news1/view.asp?aID=797> (last visited Sept. 25, 2003). See also IV Infusion, Remicade for Crohn's Disease, at <http://www.remicade-crohns.com/remicade/infusion.jsp> (last visited Sept. 25, 2003) (stating that the typical use of this drug involves three infusions in fairly rapid succession, followed by maintenance infusions every eight weeks).

33. Types of Medications, *supra* note 27.

34. HARRISON'S, *supra* note 9, at 1690; Surgery for Crohn's Disease, *supra* note 21; Surgery for Ulcerative Colitis, *supra* note 21.

35. HARRISON'S, *supra* note 9, at 1690.

36. HARRISON'S, *supra* note 9, at 1690; Surgery for Crohn's Disease, *supra* note 21 (stating that another potential option for people with Crohn's disease is strictureplasty, which is a procedure that involves the widening of the narrowed intestinal channel); Surgery for Ulcerative Colitis, *supra* note 21.

37. Surgery for Ulcerative Colitis, *supra* note 21.

38. See *Pangalos v. Prudential Ins. Co.*, 5 AD Cases 1825, 1996 U.S. Dist. LEXIS 15749 (E.D. Pa. Oct. 15, 1996). In *Pangalos*, the plaintiff, who suffered from severe ulcerative colitis, refused to treat his condition through surgery because he did not want to have his colon removed and be required to use an external appliance to collect waste. *Id.* at 1826.



pouch for the collection of waste, which eliminates the need for an external appliance.<sup>39</sup>

As with any surgery, these treatment options present risks. Specifically, there is a twenty percent morbidity rate for people who *elect* to have surgery for colitis; a thirty percent morbidity rate for “urgent” colitis surgery; and a forty percent morbidity rate for people who undergo emergency surgery for this condition.<sup>40</sup> The good news, however, for colitis patients who do elect the surgery is that once the diseased organ is removed, the symptoms of the disease typically end.<sup>41</sup>

In the case of Crohn’s disease, a few more surgical options exist. However, because surgery does not cure Crohn’s disease, and because Crohn’s disease typically resurfaces, surgeons usually remove only the part of the intestine affected by the disease.<sup>42</sup> With small intestine involvement, the rate of required surgery is approximately eighty percent.<sup>43</sup> With large intestine involvement only, that rate slips down to fifty percent.<sup>44</sup> Up to fifty percent of those who have surgery need a second operation.<sup>45</sup>

Despite the pain and inconvenience sufferers of colitis and Crohn’s disease endure, many of these individuals are left unprotected by legislation intended to help individuals who need a level playing field in the workplace.<sup>46</sup> Specifically, as the cases that will be discussed below will demonstrate, the ADA and the Rehabilitation Act have not resulted in many successful outcomes for plaintiffs suffering from colitis or Crohn’s disease.<sup>47</sup> Unsuccessful outcomes occur either because the plaintiffs cannot prove that they suffer from a “disability,”<sup>48</sup> or because they cannot demonstrate that they can perform the essential functions of their jobs with a reasonable accommodation.<sup>49</sup> Because of this catch-22, the success rates of plaintiffs stricken with colitis or Crohn’s disease have been extremely

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39. Surgery for Ulcerative Colitis, *supra* note 21.

40. HARRISON’S, *supra* note 9, at 1690.

41. *See id.* There is, however, a risk involved with people who elect to have the surgery with the internal pouch. *Id.* Specifically, there is a possibility of bowel obstruction with this procedure. *Id.* Additionally, there is a five to ten percent chance that a patient who undergoes this type of surgery will eventually need to replace the internal pouch with an external pouch due to “pouch failure.” *Id.*

42. Surgery for Crohn’s Disease, *supra* note 21.

43. HARRISON’S, *supra* note 9, at 1690.

44. *Id.*

45. Surgery for Crohn’s Disease, *supra* note 21.

46. *See* 42 U.S.C. § 12101(a)-(b) (2000).

47. *See infra* Part III.A-B.

48. *See* 42 U.S.C. § 12102(2).

49. *See id.* § 12111(8).

disappointing to these individuals and to patient advocate groups.<sup>50</sup> Even more disheartening, however, is that individuals with these specific illnesses are not the only plaintiffs having difficulty prevailing in ADA lawsuits, but rather most ADA plaintiffs experience a similar predicament.<sup>51</sup>

### III. THE CATCH-22 OF ADA PLAINTIFFS WITH GASTROINTESTINAL DISORDERS AND OTHER "HIDDEN" ILLNESSES

Plaintiffs with gastrointestinal diseases such as ulcerative colitis and Crohn's disease (and many other "hidden" illnesses) often find themselves in a not-so-uncommon, and unenviable position. On one hand, they must first prove they are "sick enough," and therefore have a "disability" within the meaning of the ADA and/or the Rehabilitation Act, yet they must also prove they are not "too sick," and can still perform the essential functions of their jobs with a reasonable accommodation.<sup>52</sup> If judged to be "not sick enough," a plaintiff will not qualify as having a disability within the meaning of the ADA.<sup>53</sup> If, however, a plaintiff can prove he has a substantial limitation on a major life activity (a "disability"), he must then prove that he can still perform the essential functions of his job.<sup>54</sup> This catch-22 often causes ADA and Rehabilitation Act plaintiffs with gastrointestinal diseases to lose their cases on the merits, and often times very early early on in the litigation process.<sup>55</sup>

ADA plaintiffs must first prove that they have a disability within the meaning of the ADA<sup>56</sup> by showing that: (1) they suffer from a physical or mental impairment that substantially limits one or more major life activities;<sup>57</sup> (2) they have a record of such an impairment;<sup>58</sup> or (3) they are regarded as having such an impairment.<sup>59</sup> Although the United States Code defines "disability,"<sup>60</sup> the Code of Federal Regulations defines the terms

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50. See Colker, *A Windfall for Defendants*, *supra* note 8 (observing that most ADA cases have resulted in pro-defendant outcomes); Colker, *Winning and Losing Under the ADA*, *supra* note 8 (same).

51. Colker, *A Windfall for Defendants*, *supra* note 8; Colker, *Winning and Losing Under the ADA*, *supra* note 8.

52. § 12111(8). Specifically, not only must an ADA plaintiff demonstrate that he has a disability, he must also prove that he is a "qualified individual with a disability." *Id.*

53. See *infra* Part III.A.

54. See *infra* Part III.B.

55. See Colker, *A Windfall for Defendants*, *supra* note 8, at 101-02.

56. § 12102(2).

57. § 12102(2)(A).

58. § 12102(2)(B).

59. § 12102(2)(C).

60. § 12102(2)(A)-(C).

that make up that definition: "impairment,"<sup>61</sup> "substantially limits,"<sup>62</sup> and "major life activity."<sup>63</sup>

Most ADA plaintiffs with colitis and Crohn's disease can satisfy the definition of "physical or mental impairment"<sup>64</sup> and typically identify a "major life activity"<sup>65</sup> impacted by such an impairment; it is the "substantially limits" definition that causes these plaintiffs trouble when trying to establish an ADA claim.<sup>66</sup> As a result of several Supreme Court decisions over the past few years, this hurdle has become even more difficult to overcome.<sup>67</sup>

Specifically, one issue federal courts considered during the 1990s was whether to evaluate ADA plaintiffs with regard to the mitigating measures they used to control their illnesses.<sup>68</sup> The courts asked whether, when determining disability status under the ADA, a plaintiff who uses a measure

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61. 29 C.F.R. § 1630.2(h) (2002). The C.F.R. defines a physical or mental impairment as: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

*Id.*

62. *Id.* § 1630.2(j). The C.F.R. defines "substantially limits" as:

(i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

*Id.* The EEOC also lists factors that should be considered when "determining whether an individual is substantially limited in a major life activity." § 1630.2(j)(2). These factors include "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.*

63. *Id.* § 1630.2(i). The C.F.R. provides examples as to what activities constitute major life activities. Some of these examples include: "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

64. *See id.* § 1630.2(h).

65. *See id.* § 1630.2(i).

66. *See id.* § 1630.2(j).

67. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (requiring consideration of mitigating measures when determining whether an individual suffers from a disability under the Act); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (following *Sutton* and concluding that mitigating measures must be considered when determining whether an individual suffers from a disability under the Act); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that a body's internal mechanisms that compensate for an individual's physical limitations must be evaluated when determining whether that individual suffers from a disability under the Act).

68. *See Sutton*, 527 U.S. at 475; *Murphy*, 527 U.S. at 521; *Albertson's*, 527 U.S. at 567.

that ameliorates the effect of an impairment should be evaluated in his corrected or uncorrected state.<sup>69</sup> After various United States Courts of Appeals reached conflicting answers to this question, the Supreme Court decided *Sutton v. United Air Lines, Inc.*<sup>70</sup>

In *Sutton*, two sisters with severe myopia sued United Air Lines after their employment applications were rejected because the plaintiffs were unable to meet the airline's minimum vision requirements.<sup>71</sup> In deciding whether to consider mitigating measures when determining whether the plaintiffs suffered from a disability under the ADA, the Court first turned to the Act's definition of "disability."<sup>72</sup> After observing that various federal agencies had the responsibility for promulgating regulations for the various titles of the Act,<sup>73</sup> the Court found no agency had the responsibility for promulgating regulations implementing the generally applicable provisions of the Act, including the definition of the term "disability."<sup>74</sup> The Court noted that the Equal Employment Opportunity Commission ("EEOC") and the Attorney General had issued Interpretive Guidelines on this specific issue, which favored *ignoring* mitigating measures when analyzing a disability.<sup>75</sup>

The sisters in *Sutton* argued that the Court should rely on the agencies' interpretations because the Act did not directly address the issue of whether to consider mitigating measures, and also because the EEOC's and Attorney General's opinions were not inconsistent with the Act.<sup>76</sup> United argued that the Court owed no deference to the agencies' interpretations because the Act's plain meaning conflicted with those interpretations.<sup>77</sup> United persuaded the Court that the plain meaning of the Act conflicted with the agency interpretation, and that courts must take mitigating

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69. See *Sutton*, 527 U.S. at 475; *Murphy*, 527 U.S. at 521; *Albertson's*, 527 U.S. at 567.

70. *Sutton*, 527 U.S. 471 (1999). Parts of the following case descriptions are taken from an earlier article, Lawrence D. Rosenthal, *Requiring Individuals To Use Mitigating Measures in Reasonable Accommodation Cases After the Sutton Trilogy: Putting the Brakes on a Potential Runaway Train*, 54 S.C. L. REV. 421, 440-43 (2002).

71. Rosenthal, *supra* note 70, at 440 (citing *Sutton*, 527 U.S. at 475-76).

72. *Id.* at 441 (citing *Sutton*, 527 U.S. at 478); see 42 U.S.C. § 12102(2) (2000).

73. Rosenthal, *supra* note 70, at 441 (citing *Sutton*, 527 U.S. at 478-79). The EEOC had the responsibility for promulgating regulations regarding the employment-related aspects of the Act, while the Attorney General had the responsibility for promulgating regulations regarding the Act's public services provisions. *Id.* at 441 n.128 (citing *Sutton*, 527 U.S. at 478).

74. *Id.* (citing *Sutton*, 527 U.S. at 479).

75. *Id.* at 441-42 (citing *Sutton*, 527 U.S. at 479-80). The Court noted that according to the EEOC Guidelines, "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Id.* at 441-42 n.130 (citing *Sutton*, 527 U.S. at 480).

76. *Id.* at 442 (citing *Sutton*, 527 U.S. at 481).

77. *Id.* (citing *Sutton*, 527 U.S. at 481-82).

measures into consideration when determining whether an individual suffers from a disability.<sup>78</sup>

The Court's conclusion was based on three separate provisions of the Act.<sup>79</sup> The Court initially looked at the phrase "substantially limits" and determined that because Congress drafted that phrase in the present indicative verb form, Congress intended it to cover only people who are *presently* (not potentially or hypothetically) substantially limited.<sup>80</sup> Next, the Court addressed the Act's requirement that the definition of "disability" be evaluated "with respect to an individual."<sup>81</sup> The Court reached a pro-employer conclusion by determining that because the Act focused on the individual—rather than on a specific diagnosis—the Act required the evaluation of the effect of mitigating measures on the ADA plaintiff.<sup>82</sup> Finally, the Court looked to the Congressional finding that "some 43,000,000 Americans" suffer from disabilities, and concluded that Congress must have intended to take mitigating measures into account, or the number referenced would have been much higher.<sup>83</sup> Because the plaintiffs in *Sutton* could have corrected their vision impairments with corrective lenses, the Court concluded that they did not have impairments that substantially limited their major life activities; therefore, they were not actually disabled under the Act.<sup>84</sup>

The Court also addressed the "regarded as" prong of the disability definition,<sup>85</sup> and concluded that the plaintiffs did not qualify as being regarded as substantially limited in the major life activity of working.<sup>86</sup> The

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78. *Id.* (citing *Sutton*, 527 U.S. at 482).

79. *Id.* (citing *Sutton*, 527 U.S. at 482).

80. *Id.* (citing *Sutton*, 527 U.S. at 482-83).

81. *Id.* (citing *Sutton*, 527 U.S. at 483-84).

82. *Id.* (citing *Sutton*, 527 U.S. at 483-84).

83. *Id.* (citing *Sutton*, 527 U.S. at 484-87). The Court noted that the corresponding finding in the 1988 forerunner to the ADA was drawn from a report by the National Council on Disability. *Id.* (citing *Sutton*, 527 U.S. at 484-88 (citing Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C. R.-C. L. L. REV. 413, 434 n.117 (1991))). The Court also noted that in 1988, the National Council on Disability issued a report that stated approximately thirty-seven million individuals suffered from a "functional limitation." *Id.* (citing NATIONAL COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE 17 (1988), available at <http://www.ncd.gov/newsroom/publications/threshold.html>)).

84. *Id.* (citing *Sutton*, 527 U.S. at 488-89).

85. 42 U.S.C. § 12102(2)(C) (2000).

86. Rosenthal, *supra* note 70, at 442-43 (citing *Sutton*, 527 U.S. 489-90). The Court noted that the petitioners only alleged that they were regarded as being substantially limited in the major life activity of working, and did not argue that they were regarded as being substantially limited in the major life activity of seeing. *Id.* at 443 n.140 (citing *Sutton*, 527 U.S. at 490). The Court noted that the petitioners failed to make this "obvious argument," but refrained from

Court reached this conclusion based in part on the high burden of proof required of the plaintiff.<sup>87</sup> The Court therefore affirmed the Tenth Circuit's judgment.

On the same day it decided *Sutton*, the Court decided *Murphy v. United Parcel Service, Inc.*,<sup>88</sup> the second case in the *Sutton* trilogy.<sup>89</sup> In *Murphy*, the Court ruled in favor of the defendant-employer, concluding that the determination of whether an individual has an impairment that substantially limits a major life activity must take into account the plaintiff's mitigating measures.<sup>90</sup> The concluding case in the *Sutton* trilogy is *Albertson's, Inc. v. Kirkingburg*.<sup>91</sup> In *Albertson's*, the Court concluded that courts must consider internal mechanisms the body develops for coping with an impairment when determining whether an individual suffers from a disability within the meaning of the ADA.<sup>92</sup>

The ramifications of this trilogy of cases dishearten many potential and actual ADA plaintiffs, including those who suffer from ulcerative colitis and Crohn's disease. Under the Court's reasoning, if individuals take the available medications, they will most likely lose ADA protection because they will not be "sick enough" to satisfy the definition of "disability" under the Act. If, however, these plaintiffs do not take the available medication, they lose ADA protection because they will be "too sick" to perform the essential functions of their job.<sup>93</sup> Still, other courts might find plaintiffs who are not using mitigating measures are still not "sick enough," evaluating them as if they were taking medication.<sup>94</sup> Finally, because surgery presents an available option for individuals who suffer from these illnesses, some

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commenting on the argument's probability of success. *Id.* at 443 n.140 (citing *Sutton*, 527 U.S. at 490).

87. *Id.* at 443 (citing *Sutton*, 527 U.S. at 491-94). Justices Stevens and Breyer dissented. In his dissenting opinion, Justice Stevens argued that the plaintiffs in *Sutton* did have a disability covered by the ADA. *Id.* at n.142 (citing *Sutton*, 527 U.S. at 513). Justice Stevens's reasoning was based on the Act's legislative history and on the fact that the executive agencies charged with interpreting the Act agreed that mitigating measures should *not* be considered during the disability determination analysis. *Id.* at n.142 (citing *Sutton*, 527 U.S. at 499-503 (Stevens, J., dissenting)).

88. 527 U.S. 516 (1999).

89. Rosenthal, *supra* note 70, at 448.

90. *Id.* (citing *Murphy*, 527 U.S. at 518-519).

91. *Id.* at 450 (citing *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)).

92. *Albertson's*, 527 U.S. at 565-66.

93. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2000). To receive ADA protection, an individual must not only have a disability, but must also be a "qualified individual with a disability." *Id.*

94. See Rosenthal, *supra* note 70, at 444-46. See also *Tangires v. The Johns Hopkins Hosp.*, 79 F. Supp. 2d 587 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000) (holding that the plaintiff did not have a disability because, had she used the available mitigating measure, her impairment would not have substantially limited any major life activities).

courts in the future might find against these plaintiffs because sufferers of these illnesses can “cure” their disease through surgery.<sup>95</sup>

### A. The “You’re Not Sick Enough” Cases

Although the initial disability determination occurs on a case-by-case basis, and the plaintiff’s actual diagnosis is not determinative of whether that individual satisfies the definition of “disability,”<sup>96</sup> most ADA plaintiffs with ulcerative colitis or Crohn’s disease have been unable to prove they have a “disability” within the meaning of the ADA or the Rehabilitation Act. In both the federal trial courts and the federal appellate courts, sufferers of colitis and Crohn’s disease are repeatedly being found to be not “sick enough,” and therefore not considered disabled under the ADA or Rehabilitation Act. As a result, they are being left unprotected by this legislation.

In *Cotter v. Ajilon Services, Inc.*,<sup>97</sup> the United States Court of Appeals for the Sixth Circuit concluded that the plaintiff, who was suffering from colitis and was forced to spend time in the hospital as a result of his illness,<sup>98</sup> did not establish that he was disabled within the meaning of the ADA.<sup>99</sup> In *Cotter*, the plaintiff worked for a temping agency and was diagnosed with ulcerative colitis near the time the defendant hired him.<sup>100</sup> Two years after his initial hire, the plaintiff collapsed and was hospitalized as a result of his

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95. *Pangalos v. Prudential Ins. Co.*, 5 AD Cases 1825, 1827, 1996 U.S. Dist. LEXIS 15749 (E.D. Pa. October 15, 1996) (noting the possibility that because the plaintiff could have “cured” his colitis with surgery, he did not have a disability under the ADA).

96. The following cases all stand for the proposition that the determination of whether an ADA plaintiff has a disability within the meaning of the Act should be made on a case-by-case basis: *Pollard v. High’s of Baltimore, Inc.*, 281 F.3d 462, 468 (4th Cir. 2002), *cert. denied*, 537 U.S. 827 (2002); *Cotter v. Ajilon Serv’s., Inc.*, 287 F.3d 593, 598 (6th Cir. 2002); *Bristol v. Bd. of County Comm’rs*, 281 F.3d 1148, 1156 (10th Cir. 2002); *Navarro v. Pfizer Corp.*, 261 F.3d 90, 104 (1st Cir. 2001); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001); *Mason v. United Air Lines, Inc.*, 274 F.3d 314, 317 (5th Cir. 2001); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 923 (7th Cir. 2001); *Mathieu v. Gopher News Co.*, 273 F.3d 769, 775 (8th Cir. 2001); *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 794 (9th Cir. 2001); *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275, 1284 (11th Cir. 2001); *Schaefer v. State Ins. Fund*, 207 F.3d 139, 143 (2d Cir. 2000).

97. 287 F.3d 593 (6th Cir. 2002).

98. *Id.* at 596. Although the court did not give the specifics of the physical manifestations of the disease, and how those manifestations affected the plaintiff, it did define the disease as “an intestinal ailment which has no known cure but may be controlled by medication, a proper diet, exercise, and adequate rest.” *Id.*

99. *Id.* at 601.

100. *Id.* at 595-96.

disease.<sup>101</sup> After the plaintiff received clearance to return to work full-time, his employer discharged him for "lack of work."<sup>102</sup>

After his termination, the plaintiff sued his former employer, alleging violations of the ADA and the equivalent Michigan state anti-discrimination statute.<sup>103</sup> The lower court granted the employer's motion for summary judgment, and the plaintiff appealed, arguing that there were genuine issues of material fact regarding whether he suffered from a disability within the meaning of the ADA.<sup>104</sup> Not surprisingly, the Sixth Circuit began its analysis with an explanation of the relevant statutory provisions and sections from the Code of Federal Regulations.<sup>105</sup> The Sixth Circuit discussed the definitions of "disability" and "substantially limits," and discussed the relevant sections of the Code of Federal Regulations that indicate the factors courts should examine when determining disability status.<sup>106</sup>

After addressing these definitions and regulations, the Sixth Circuit noted the need for a fact specific inquiry, and that courts must consider mitigating measures, such as medications, when determining whether an individual suffers from a disability within the meaning of the ADA.<sup>107</sup> The court next applied a three-step approach used to determine whether an individual suffers from a disability, an approach which asks: (1) whether the plaintiff suffers from an impairment; (2) whether the activity limited by the impairment qualifies as a "major life activity;" and (3) whether the impairment "substantially limits" the major life activity.<sup>108</sup> The court then attempted to apply this test to the facts presented before it.<sup>109</sup>

Unfortunately, the only evidence the plaintiff provided was what the court deemed a "perfunctory statement" that he was substantially limited in his ability "to perform manual tasks such as lifting, bending, standing, and

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101. *Id.* at 596. Additionally, the plaintiff was forced to take various leaves of absence to cope with his illness. *Id.*

102. *Id.* This discharge occurred approximately three-and-a-half years after the plaintiff's original hiring date. *Id.* at 595-96.

103. *Id.* at 595. The equivalent state anti-discrimination statute was Michigan's Persons with Disabilities Civil Rights Act. *Id.*; MICH. COMP. LAWS §§ 37-1101-37.1607 (West 2001).

104. *Cotter*, 287 F.3d at 595.

105. *Id.* at 597-98.

106. *Id.* at 597 (citing 42 U.S.C. §§ 12102(2), 12111(8) (2000); and 29 C.F.R. §§ 1630.2(j)(1), (2) (2002)).

107. *Id.* at 598. The court relied on *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), for requiring consideration of mitigating measures when determining disability status. *Cotter*, 287 F.3d at 598.

108. *Cotter*, 287 F.3d at 598. See *Bragdon v. Abbott*, 524 U.S. 624, 625 (1998) (holding that the plaintiff's asymptomatic HIV-positive status was a disability under the ADA). The Supreme Court approved this three-step approach in this case. *Id.* at 631.

109. *Cotter*, 287 F.3d at 598-99.



carrying things.”<sup>110</sup> The plaintiff also presented evidence that his doctor ordered him to take frequent breaks at work and to avoid stress, which the court interpreted as an attempt by the plaintiff to demonstrate that he was substantially limited in his ability to work.<sup>111</sup> The Sixth Circuit found that the plaintiff’s ability to obtain and maintain a job shortly after his termination proved that he was not substantially limited in his ability to work and agreed that the plaintiff failed to present enough evidence to prove a substantial limitation on any other major life activity.<sup>112</sup> Therefore, the plaintiff failed in his attempt to prove he had an *actual* disability under the first prong of the ADA’s definition.<sup>113</sup>

The plaintiff then attempted to prove that he was *regarded as* being substantially limited in the major life activity of working under the ADA.<sup>114</sup> The Sixth Circuit concluded that the plaintiff was unable to meet the ADA’s rigorous burden of proof.<sup>115</sup> Specifically, because the plaintiff was unable to show that his former employer believed he was substantially limited in his ability to participate in a broad class of jobs (rather than in one particular job), the Sixth Circuit ultimately rejected the plaintiff’s “regarded as” claim under the ADA.<sup>116</sup>

Other United States Courts of Appeals have also determined that a person suffering from ulcerative colitis or Crohn’s disease does not necessarily qualify as an individual with a disability under the ADA. For example, in *Ryan v. Grae & Rybicki, P.C.*,<sup>117</sup> the United States Court of Appeals for the Second Circuit concluded that the plaintiff, who suffered from a rather severe case of colitis, did not meet the ADA’s disability definition.<sup>118</sup> In *Ryan*, the plaintiff worked as a legal secretary in the defendant law firm<sup>119</sup> and was diagnosed with colitis approximately eight months after she began in this position.<sup>120</sup> As a result of her condition, she

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110. *Id.* at 598.

111. *Id.*

112. *Id.* at 598-99.

113. *Id.* In any ADA action, the plaintiff has three options to try to prove he suffers from a disability; he can attempt to show either (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2) (2000).

114. *Cotter*, 287 F.3d at 599.

115. *Id.* at 600-01.

116. *Id.* The Sixth Circuit therefore affirmed the lower court’s granting of summary judgment in favor of the defendant. *Id.* at 595, 601.

117. 135 F.3d 867 (2d Cir. 1998).

118. *Id.* at 868, 873. As a result of this conclusion, the Second Circuit affirmed the lower court’s granting of summary judgment in the employer’s favor. *Id.* at 873.

119. *Id.* at 868.

120. *Id.*

experienced various physical symptoms such as “frequent and painful diarrhea, stomach cramps, and rectal bleeding.”<sup>121</sup> The court described this last symptom as “heavy” and described the stomach pain as “severe.”<sup>122</sup> It was also clear that the plaintiff ran the risk of soiling herself if she was not able to get to a restroom within ten seconds from the onset of an attack.<sup>123</sup>

Approximately one year after the plaintiff started working, the defendant terminated the plaintiff’s employment, alleging poor performance.<sup>124</sup> The plaintiff exhausted her administrative remedies and eventually filed a lawsuit accusing her employer of violating the ADA and the equivalent New York state anti-discrimination statute.<sup>125</sup> The Second Circuit first explained the process a court must follow when determining whether an individual suffers from a disability within the meaning of the ADA.<sup>126</sup> Specifically, the Second Circuit focused on the definitions of “disability,” “impairment,” “substantially limits,” and “major life activities.”<sup>127</sup>

The court first addressed the “major life activities” and the “substantially limits” aspects of the case.<sup>128</sup> It referenced the Code of Federal Regulations, which provided examples of major life activities and also defined the term “substantially limits.”<sup>129</sup> The plaintiff argued that she was substantially limited in the major life activity of controlling the elimination of her

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121. *Id.* The court also observed that the plaintiff “suffered through” nearly a constant cycle of three or four days of constipation, followed by the same period of “erratic, bloody, and painful diarrhea.” *Id.*

122. *Id.* at 869. Additionally, on at least one occasion, the plaintiff was hospitalized because of her condition. *Id.*

123. *Id.*

124. *Id.* at 869.

125. *Id.* The state equivalent is the New York State Human Rights Law, N.Y. EXEC. LAW §§ 290-301 (McKinney 2001). The United States District Court for the Eastern District of New York granted the employer’s motion for summary judgment, concluding that (1) the plaintiff did not have a disability under the ADA, and (2) even if the plaintiff was able to meet the disability definition, the employer terminated the plaintiff’s employment for a legitimate, non-discriminatory reason. *Ryan*, 135 F.3d at 869. On appeal, the defendant argued only that the plaintiff did not suffer from a disability within the meaning of the ADA, and that she was therefore not entitled to the Act’s protection. *Id.* at 870.

126. *See Ryan*, 135 F.3d at 870; *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 598 (6th Cir. 2002).

127. *Ryan*, 135 F.3d at 870. While conceding that the plaintiff did indeed suffer from an impairment, the defendant argued that this impairment did not substantially limit the plaintiff in any major life activities, and that the firm did not regard the plaintiff as being substantially limited in any major life activities. *Id.*

128. *Id.* at 870-72.

129. *Id.* at 870 (quoting 29 C.F.R. § 1630.2(j)(1) (2000)). The court referred to the factors to be weighed in making the determination of whether an impairment substantially limits a major life activity, including the “nature and severity of the impairment,” “the duration or expected duration of the impairment,” and “the permanent or long-term impact of the impairment.” *Id.* (quoting 29 C.F.R. § 1630.2(j)(2)).

waste.<sup>130</sup> Although the Code of Federal Regulations does not list this specific activity as an example of a major life activity, the court assumed that eliminating waste did constitute a major life activity.<sup>131</sup> However, the court reached the conclusion that the plaintiff was not substantially limited in this major life activity after applying the three factors set out in the Code of Federal Regulations.<sup>132</sup>

First, the court addressed the nature and severity of the impairment and found that this factor weighed in *favor* of finding a substantial limitation.<sup>133</sup> The court reasoned that because the impairment went “to the very heart of her ability to control the elimination of waste,” the impairment was indeed severe.<sup>134</sup> Next, the court analyzed the duration, or expected duration, of the impairment.<sup>135</sup> After acknowledging that this factor “arguably cut[] both ways,” the court ultimately concluded that the factor cut *against* a finding of a substantial limitation.<sup>136</sup> The court noted that although the disease was incurable and therefore had a long-term duration, the disease was not always symptomatic, and in fact the plaintiff often enjoyed extended periods of remission.<sup>137</sup> Additionally, the court observed that the plaintiff suffered severe attacks of her disease only in the summer months, suggesting that during the non-summer months, the disease did not affect her.<sup>138</sup>

Finally, the court addressed the “expected long term impact resulting from the impairment.”<sup>139</sup> The Second Circuit concluded that this factor weighed *against* a finding that the plaintiff’s colitis substantially limited her.<sup>140</sup> The court reasoned that although the plaintiff would forever be diagnosed with colitis, the sporadic nature of the disease, along with its seasonal effect, warranted a finding that the plaintiff was not substantially limited.<sup>141</sup>

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130. *Id.* at 870-71. Although controlling the elimination of waste is not listed in the Code of Federal Regulations as a major life activity, the Second Circuit noted that the list in the C.F.R. is not all-inclusive. *Id.* at 870.

131. *Id.* at 871.

132. *Id.* See also *supra* note 129.

133. *Ryan*, 135 F.3d at 871.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* In fact, the court noted that the plaintiff had recently enjoyed an eighteen-month period during which she was symptom-free. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

After finding no genuine issue of fact regarding a substantial limitation on the plaintiff's ability to eliminate her waste, the court then addressed whether her condition substantially limited her ability to care for herself.<sup>142</sup> Using the same three-factor analysis, the Second Circuit concluded that it did not; therefore, the court found that the plaintiff was not disabled under the Act.<sup>143</sup>

The United States Courts of Appeals are not the only courts looking skeptically at sufferers of colitis or Crohn's disease bringing claims under the ADA. Numerous federal district courts have also ruled against these plaintiffs, finding them unable to prove that they are "sick enough" to be substantially limited in any major life activities, and thus "disabled" under the ADA.<sup>144</sup>

The United States District Court for the Eastern District of New York was one such court to address this ADA issue.<sup>145</sup> In *Sacay v. The Research Foundation of the City University of New York*, the plaintiff suffered from a number of ailments, including colitis.<sup>146</sup> After the plaintiff's employer eliminated the plaintiff's position, the plaintiff sued various defendants on various grounds, including violations of the ADA, the Rehabilitation Act, and the state anti-discrimination statute.<sup>147</sup> After disposing of many of the

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142. *Id.* Unlike the "elimination of waste," "caring for oneself" is listed in the Code of Federal Regulations as a major life activity. 29 C.F.R. § 1630.2(i) (2002).

143. *Ryan*, 135 F.3d at 871-72. The court determined that the plaintiff was able to dress and groom herself and make her way to work, even when her colitis was symptomatic. *Id.* at 871-72. Additionally, the plaintiff enjoyed extended periods of being asymptomatic. *Id.* at 872. Finally, the fact that she had to be near a restroom or risk soiling herself did not lead the court to conclude that the plaintiff was substantially limited in the major life activity of caring for herself. *Id.* at 871-72. The plaintiff also attempted to convince the court that her employer regarded her as being substantially limited in a major life activity. *See id.* at 872. Specifically, the plaintiff alleged that her employer regarded her as being substantially limited in her ability to work. *Id.* Because the plaintiff's employer offered to provide her with good references, and because the plaintiff failed to present evidence that her employer perceived her as being incapable of performing a broad class of jobs due to her impairment, the Second Circuit quickly disposed of that argument. *Id.* at 872-73. Despite finding that the plaintiff involved in this case did not suffer from a disability, the Second Circuit did indicate that this conclusion should not be read to mean that colitis can *never* be considered a disability; the facts of each case are what determine whether a plaintiff can establish whether colitis is a disability in each particular case. *Id.* at 872. This is consistent with opinions from other United States Courts of Appeals. *E.g.*, *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 598 (6th Cir. 2002).

144. *See Sacay v. Research Found. of City Univ. of N.Y.*, 193 F. Supp. 2d 611 (E.D.N.Y. 2002); *Johnson v. N.Y. Med. Coll.*, No. 95 CIV. 8413 (JSM), 1997 WL 580708 (S.D.N.Y. Sept. 18, 1997); *Branch v. City of New Orleans*, 1994 U.S. Dist. LEXIS 18254 (E.D. La. Dec. 14, 1994).

145. *Sacay v. The Research Foundation of the City University of New York*, 193 F. Supp. 2d 611 (E.D.N.Y. 2002).

146. *Id.* at 615, 619.

147. *Id.* at 615. The plaintiff also sued under the New York City Human Rights Law, Administrative Code of the City of New York § 8-107. *Sacay*, 193 F. Supp. 2d at 615, 630.

plaintiff's claims on Eleventh Amendment immunity grounds, the court addressed the merits of the plaintiff's ADA and Rehabilitation Act claims.<sup>148</sup>

Specifically, the court considered whether the plaintiff was substantially limited in her ability to eliminate waste.<sup>149</sup> As the Second Circuit did in *Ryan*, the *Sacay* court assumed, without deciding, that eliminating waste was indeed a major life activity but held that the plaintiff was unable to prove that she was substantially limited in that activity.<sup>150</sup> The court based this conclusion on the plaintiff's evidence that she was diagnosed with irritable bowel syndrome,<sup>151</sup> and the fact that she failed to present evidence about the severity or the expected duration of the illness.<sup>152</sup> Ultimately, the court concluded that "[t]he medical evidence nowhere suggests that [the plaintiff's] colitis was sufficiently severe to substantially limit her major life activities."<sup>153</sup> The court determined the plaintiff's symptoms were insufficient to warrant a finding of a disability, especially because her condition improved with medication and rest.<sup>154</sup>

The United States District Court for the Southern District of New York also ruled against an ADA plaintiff with colitis when it decided *Johnson v. New York Medical College*.<sup>155</sup> In *Johnson*, the plaintiff suffered from colitis and depression and eventually sued her employer for allegedly violating the ADA and the equivalent state anti-discrimination statute.<sup>156</sup> Not surprisingly, the court began its ADA analysis by deciding whether the

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148. *Sacay*, 193 F. Supp. 2d at 624-25. The court first dismissed the plaintiff's claim that she was substantially limited in her ability to perform certain major life activities not associated with her gastrointestinal problems, and the court then considered whether the plaintiff was able to satisfy the definition of disability based on her gastrointestinal illness. *Id.* at 625-29.

149. *Id.* at 628.

150. *Id.* at 628-29.

151. *Id.* at 629. Although irritable bowel syndrome is not the same as ulcerative colitis, throughout the opinion, the court used both terms to describe the plaintiff's condition. *Id.* at 628-29.

152. *Id.* at 629. Also, the plaintiff only argued that she needed to be near a bathroom to avoid soiling herself, something the court did not find to be substantially limiting. *Id.*

153. *Id.*

154. *Id.* The court's reference to the positive effect of the plaintiff's medication on her condition was consistent with the Supreme Court's opinion in *Sutton v. United Air Lines, Inc.* that a plaintiff's illness must be evaluated with respect to mitigating measures. 527 U.S. 471, 482 (1999). In granting the employer's ADA summary judgment motion, the court also determined that granting the employer's motion for summary judgment under the Rehabilitation Act was appropriate. *Sacay*, 193 F. Supp. 2d at 630.

155. No. 95, CIV. 8413 (JSM), 1997 WL 580708 (S.D.N.Y. Sept. 18, 1997).

156. *Id.* at \*1-2. The state statute under which the plaintiff sued was N.Y. EXEC. LAW §§ 290-301 (McKinney 2001).

plaintiff suffered from an impairment.<sup>157</sup> The court concluded that the plaintiff's colitis was indeed an impairment within the meaning of the Act and next addressed whether that impairment substantially limited any of the plaintiff's major life activities.<sup>158</sup> The plaintiff alleged that her colitis substantially limited her major life activities of working and having sex.<sup>159</sup> After looking at the nature and severity of the plaintiff's impairment, its duration or expected duration, and its long-term or expected long-term impact, the court concluded that the plaintiff did not present an issue of fact as to whether she was substantially limited in her ability to work.<sup>160</sup>

Specifically, the court observed that at her deposition, the plaintiff admitted that her condition did not affect her ability to work, and that she could not recall any days where she was unable to work due to her condition.<sup>161</sup> The plaintiff further admitted that even when her condition was active (the plaintiff experienced times during which her condition was not active), she was able to go to work and perform other functions, and she only needed to be near a bathroom.<sup>162</sup> The court observed that although the plaintiff experienced accidents on two occasions, these did not cause the plaintiff's condition to be classified as a substantial limitation on her ability to work.<sup>163</sup> In reaching this conclusion, the court relied on several other courts for the proposition that colitis was not a disability under the Act.<sup>164</sup>

After dismissing the plaintiff's contention that she was substantially limited in her ability to work, the court quickly dismissed the plaintiff's alternative allegations that she was substantially limited in her ability to have sex, and that sex was a major life activity.<sup>165</sup> The court concluded that

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157. Johnson, No. 95, CIV. 8413 (JSM), 1997 WL 580708 at \*5.

158. *Id.*

159. *Id.* With respect to the major life activity of working, because a plaintiff must demonstrate a limitation in performing a *class* of jobs rather than one specific job, attempting to win with this argument on an ADA claim is quite difficult. *Id.*

160. *Id.* at \*5-6.

161. *Id.* at \*6.

162. *Id.* The court also noted that the plaintiff was able to drive thirty-five to forty minutes to work each day, only pulling over to use a restroom on a few occasions. *Id.* And, even on those occasions, the plaintiff was still able to report to work. *Id.*

163. *Id.*

164. *Id.* (citing *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867 (2d Cir. 1998); *Branch v. City of New Orleans*, No. 93-1273, 1995 WL 295320 (E.D. La. May 8, 1995); *Caporilli v. City of Rome, New York*, No. 85 CV. 1320, 1992 WL 209327 (N.D.N.Y. Aug. 13, 1992). The court did this even though the disability determination should be made on a case-by-case basis, taking into account how the impairment *actually affected* the person suffering from it, and not solely on the basis of the diagnosis and how other courts have regarded the illness. *E.g.*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999); *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 598 (6th Cir. 2002).

165. *Johnson*, 1997 WL 580708, at \*6.

the plaintiff's reliance on *Abbott v. Bragdon*<sup>166</sup> and *Pacourek v. Inland Steel Co.*<sup>167</sup> was misplaced because those cases did not, as the plaintiff contended, stand for the proposition that sex was a major life activity.<sup>168</sup> The court therefore concluded that the plaintiff's colitis did not reach the level of a disability under the ADA.<sup>169</sup>

In one of the earlier ADA cases involving a plaintiff with a gastrointestinal disease, the United States District Court for the Eastern District of Louisiana concluded that the plaintiff was not entitled to a judgment as a matter of law on the issue of whether her colitis reached the level of a disability under the ADA and the Rehabilitation Act.<sup>170</sup> Specifically, in *Branch*, the court concluded that "a jury could reasonably conclude" that the plaintiff's ailment was not a disability under the ADA or the Rehabilitation Act, and the court therefore denied the plaintiff's Rule 50 motion for judgment as a matter of law on this issue.<sup>171</sup>

In *Branch*, the plaintiff suffered from severe ulcerative colitis and sued her former employer for terminating her employment.<sup>172</sup> Addressing the propriety of the plaintiff's Rule 50 motion on the issue of whether she suffered from a disability, the court undertook the three-step process used to determine disability status.<sup>173</sup> The court first implicitly concluded that the plaintiff did suffer from an impairment.<sup>174</sup> After overcoming this initial hurdle, however, the plaintiff's argument failed.<sup>175</sup> Prior to reaching the merits of the "substantially limits" and the "major life activity" aspects of

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166. 912 F. Supp. 580 (D. Me. 1995) (concluding that the plaintiff's HIV infection was a disability under the ADA). This case ultimately reached the Supreme Court, where the Court ruled in favor of the HIV-positive plaintiff. See *Bragdon v. Abbott*, 524 U.S. 624 (1998).

167. 858 F. Supp. 1393 (N.D. Ill. 1994) (alleging pregnancy discrimination).

168. *Johnson*, 1997 WL 580708, at \*6. Rather, the court concluded that those cases involved plaintiffs who had problems with their reproductive systems. *Id.* The court also concluded that even if sex was a major life activity for purposes of the ADA, the plaintiff's "claimed disinterest" in sex was not a substantial limitation on that major life activity. *Id.*

169. *Id.*

170. *Branch v. City of New Orleans*, 1994 U.S. Dist. LEXIS 18254 \*5. In *Branch*, some confusion existed over whether the plaintiff suffered from colitis or Crohn's disease; although the two illnesses are different, the court seemed to use the two terms interchangeably. *Id.* at \*1.

171. *Id.* at \*5.

172. *Id.* at \*1. As previously indicated, the court used the terms "colitis" and "Crohn's disease" interchangeably throughout the opinion.

173. *Id.* at \*2. Specifically, as was discussed earlier in this Article, this three-step process involves: (1) determining whether the plaintiff suffers from an impairment; (2) determining whether this impairment limits a major life activity; and (3) determining whether the major life activity is substantially limited. *Id.* See *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 597 (6th Cir. 2002) (citing 42 U.S.C. § 12102(2) (2000)). *Bragdon v. Abbott*, 524 U.S. 624, 630-31 (1998).

174. *Branch*, 1994 U.S. Dist. LEXIS 18254, \*2-3.

175. *Id.* at \*3

the analysis, the court did note that the *actual physical effects* of the disease on the plaintiff, rather than the diagnosis, must be evaluated to make the disability determination.<sup>176</sup> The court noted:

In making the [disability] determination, the name or diagnosis of the individual's impairment provides little guidance to the fact finder. Indeed, some impairments may be disabling for particular individuals and not for others, depending on the stage of the disorder or the severity of the affliction. This is especially true when the adverse effects of an impairment are felt only sporadically.<sup>177</sup>

The court rejected the plaintiff's attempts to use the case of *Kling v. County of Los Angeles*<sup>178</sup> to establish the legal proposition that Crohn's disease should always be considered a disability.<sup>179</sup> The court was also unwilling to follow case law applying New York's state anti-discrimination statute because the definition of disability under the state statute lacked the "substantially limits a major life activity" language.<sup>180</sup> After analyzing these cases and the previously discussed statements on ADA disability determinations, the court in *Branch* applied those rules and cases to the facts before it.<sup>181</sup> Unfortunately, the plaintiff's own testimony indicated that her condition flared up infrequently, and that when it did flare up, she was often able to perform major life activities.<sup>182</sup> Therefore, the court rejected the plaintiff's Rule 50 motion.<sup>183</sup>

After the jury ruled in favor of the employer, the plaintiff filed a motion for judgment as a matter of law, or in the alternative, a motion for a new trial.<sup>184</sup> One of the issues the plaintiff raised was whether the plaintiff's colitis reached the level of a disability within the meaning of the ADA or the Rehabilitation Act.<sup>185</sup> The jury had concluded otherwise, and the court was asked to determine whether that finding was an acceptable

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176. *Id.* at \*2-3 (emphasis added).

177. *Id.* at \*2-3.

178. 633 F.2d 876 (9th Cir. 1980), *remanded to* 769 F.2d 532 (9th Cir. 1985), *and rev'd*, 474 U.S. 936 (1985).

179. *Branch*, 1994 U.S. Dist. LEXIS 18254 at \*3, \*5.

180. *Id.* at \*4. Specifically, the New York state equivalent did not include the "substantially limits" and the "major life activities" language in its disability definition, but rather defined disability as "any physical or mental impairment." N.Y. EXEC. LAW § 296 (McKinney 2001). See *Antonsen v. Ward*, 571 N.E. 2d 636, 639 (N.Y. 1991).

181. *Branch*, 1994 U.S. Dist. LEXIS 18254 at \*4-5.

182. *Id.*

183. *Id.* at \*5.

184. *Branch v. City of New Orleans*, 1995 U.S. Dist. LEXIS 6548 (E.D. La. May 9, 1995).

185. *Id.* at \*8.



interpretation of the facts of the case.<sup>186</sup> The court upheld the jury's conclusion, and therefore denied the plaintiff's post-trial motion.<sup>187</sup>

In making its determination, the court examined the three-part analysis used in determining disability status under the ADA the Rehabilitation Act, and it also evaluated the relevant sections of the *Code of Federal Regulations*.<sup>188</sup> Specifically, the court observed that "some impairments may be disabling for particular individuals but not for others depending on the stage of the disease, the presence of other impairments that combine to make the impairment disabling or any number of any other factors."<sup>189</sup> The court concluded that the plaintiff's disease was not an inherently disabling condition, and the facts of this particular case did not warrant a finding that the jury's conclusion was unsupported.<sup>190</sup> Thus, another sufferer of a "hidden" gastrointestinal illness was denied protection under federal legislation intended to help individuals with illnesses compete in the workplace.

The cases discussed in this section of the Article illustrate one of the many difficulties plaintiffs suffering from either ulcerative colitis or Crohn's disease face when attempting to establish claims under the ADA or the Rehabilitation Act.<sup>191</sup> However, this dilemma is not limited to plaintiffs suffering from these particular gastrointestinal disorders, but is also prevalent with many ADA plaintiffs who suffer from all types of illnesses.<sup>192</sup> In fact, not even victims of cancer (including, colon cancer, one of the leading causes of cancer deaths in this country),<sup>193</sup> can always establish a disability under the ADA.<sup>194</sup>

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186. *Id.* at \*7.

187. *Id.* at \*13-15.

188. *Id.* at \*8-9.

189. *Id.* at \*9 (citing 29 C.F.R. pt. 1630, app.).

190. *Id.* at \*13. The plaintiff appealed to the U.S. Court of Appeals for the Fifth Circuit, but again, did not prevail. 78 F.3d 582 (5th Cir. 1996).

191. In addition to the cases cited in this section of the Article, other cases exist in which plaintiffs were unable to prove that their illnesses constituted a disabilities under the ADA. *E.g.*, *Douglas v. General Motors Corp.*, 982 F. Supp. 1448, 1449 (D. Kan. 1997). In *Douglas*, the plaintiff was unable to prove a disability when she suffered from a shoulder injury, a neck injury, and Crohn's disease. *Id.* at 1449, 1451-52. The court concluded that she could not prove that these conditions substantially limited her ability to work. *Id.*

192. *See supra* note 8.

193. For a breakdown of cancer rates, see *Cancer Facts & Figures* on the website of the American Cancer Society at <http://www.cancer.org/downloads/STT/CAFF2003PWSecured.pdf> (last visited Nov. 9, 2003).

194. Despite the dreaded nature of this disease, some courts have been reluctant to find that cancer constitutes a disability under the ADA. *See EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 653-54 (5th Cir. 1999) (holding that plaintiff's blood cancer was not a substantial limitation on any major life activities); *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 909, 915 (11th Cir. 1996) (holding that plaintiff's malignant lymphoma did not constitute a

However, even if ADA plaintiffs can clear the first litigation hurdle and prove that they have a disability under the ADA, they are often still left unprotected by the ADA and/or the Rehabilitation Act. Although these plaintiffs can prove disability, courts are concluding that these individuals are unable to perform the essential functions of their positions with a reasonable accommodation, and are thus not qualified for the positions in question.<sup>195</sup> This is the second part of the “you’re not sick enough”/“you’re too sick” dilemma.

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disability under the ADA); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 189 (5th Cir. 1996) (holding that plaintiff's breast cancer did not constitute a disability under the ADA); *Demming v. Housing and Redevelopment Auth.*, 66 F.3d 950, 955 (8th Cir. 1995) (noting that a plaintiff with thyroid cancer did not establish a disability under the Rehabilitation Act); *Nave v. Wooldridge Constr.*, 8 A.D. Cases 1351, 1357, 1997 U.S. Dist. LEXIS 9203 (E.D. Pa. June 30, 1997) (holding that the plaintiff's Hodgkin's disease was not a disability). In *Dinsdale v. Foresman-Addison Wesley*, the United States District Court for the Northern District of Iowa found that the ADA plaintiff was not able to establish she had a disability under the Act, even after being diagnosed with, and undergoing chemotherapy treatment and surgery for, colon cancer. 10 A.D. Cases 1400, 1403-04, 2000 U.S. Dist. LEXIS 12015 (N.D. Iowa April 13, 2000). The plaintiff was a sales representative for a book company who was diagnosed with colon cancer in April of 1996. *Id.* at 1401. After undergoing surgery and chemotherapy, the plaintiff returned to work in June of 1996, after her employer had merged with another company. *Id.* at 1401-02. Before being rehired as an employee of the new, merged company, the plaintiff interviewed for the position and informed her new employer that she would be able to work, and that her limitations involved lifting heavy objects and having to pace herself to cope with her fatigue. *Id.* at 1402. Despite her belief that she would be able to work as an effective member of the new company, the plaintiff was unable to meet her sales goals. *Id.* Her employer gave her several warnings, placed her on a personal improvement plan, and told the plaintiff that she was not progressing. *Id.* Ultimately, her employer fired her and gave her three months' severance pay. *Id.* The plaintiff filed suit, alleging violations of the ADA, the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (2000), and state law. *Id.* at 1401. The court first addressed the definition of disability under the ADA. *Id.* at 1402. After reviewing the relevant statutory definitions and federal regulations, the court focused on the plaintiff's specific allegation: that she was suffering from a physical impairment that substantially limited her ability to perform the major life activity of working. *Id.* at 1403. Although the court agreed that the cancer constituted an impairment under the ADA, and that working was a major life activity, the court concluded that the plaintiff was unable to establish that her cancer substantially limited her ability to work. *Id.* The plaintiff was able to work full-time after her leave of absence, and she admitted her ability to return to work. *Id.* Because the plaintiff could not establish the substantially limited prong of her ADA claim, the court did not have to address the other issues involved in the plaintiff's claim. *Id.* The court therefore granted the employer's motion for summary judgment. *Id.*; but see *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081 (7th Cir. 2000). In *Robin*, the plaintiff was diagnosed with colon cancer and was eventually terminated from his sales position. 200 F.3d at 1086-87. The plaintiff filed suit against his employer alleging discrimination based on religion, age, and disability. *Id.* at 1085. Although the plaintiff's disability was not an issue the Seventh Circuit addressed in detail, it acknowledged that the plaintiff's illness placed him within the class protected by the ADA. *Id.* at 1090.

195. *E.g.*, *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998).

### B. The "You're Too Sick" Cases

Unlike the many plaintiffs described in the previous cases who were unable to convince a court that they were substantially limited in any major life activities, some plaintiffs with colitis or Crohn's disease did overcome this initial hurdle and established that they had a disability under the ADA or the Rehabilitation Act.<sup>196</sup> Unfortunately, these initial victories were short-lived because the plaintiffs were unable to convince courts that, despite their disabilities, they were capable of performing the essential functions of their jobs with reasonable accommodations.<sup>197</sup> Therefore, these plaintiffs fell into the "you're too sick" category because they did not meet the definition of being a "qualified individual with a disability."<sup>198</sup>

In *Nesser v. Trans World Airlines, Inc.*,<sup>199</sup> the Eighth Circuit Court of Appeals affirmed the lower court's granting of summary judgment in favor of the employer in an ADA claim brought by a sufferer of Crohn's disease.<sup>200</sup> The plaintiff began his employment with Trans World Airlines (TWA) in 1993 and was terminated approximately three years later.<sup>201</sup> The plaintiff first worked as a reservation sales agent and later transferred to the position of rate desk agent.<sup>202</sup> The plaintiff eventually transferred again, this time to the position of customer service agent, a position he held until his termination in January 1996.<sup>203</sup>

The plaintiff suffered from Crohn's disease,<sup>204</sup> and because of the plaintiff's illness, TWA granted him various medical leaves ranging in length from five days to over two months.<sup>205</sup> As a result of these absences, the plaintiff received numerous written warnings.<sup>206</sup> After his first warning in 1995, the plaintiff requested to work at home, but TWA denied this request.<sup>207</sup> The plaintiff received two more warnings throughout 1995, with the last notice warning him of the possibility of discharge.<sup>208</sup>

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196. *E.g.*, *Nesser*, 160 F.3d at 445.

197. *Id.*

198. *See* The Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2000).

199. 160 F.3d 442 (8th Cir. 1998).

200. *Id.* at 446.

201. *Id.* at 444.

202. *Id.*

203. *Id.*

204. *Id.* The court described Crohn's disease as "an inflammatory bowel disorder that produces a thickening of the intestinal wall, a narrowing of the bowel channel, and a variety of symptoms including abdominal pain, fever, diarrhea, flatulence, fatigue, extreme pain, and dehydration." *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

Due to the plaintiff's excessive absences, TWA held a final hearing in early 1996 and terminated the plaintiff's employment five days later.<sup>209</sup> The plaintiff filed a charge of discrimination with the EEOC, alleging violations of the ADA and the equivalent state anti-discrimination statute.<sup>210</sup> After receiving his notice of a right to sue, the plaintiff filed suit in the United States District Court for the Eastern District of Missouri.<sup>211</sup> That court granted TWA's motion for summary judgment, concluding that the plaintiff failed to create a genuine issue of material fact as to whether he could perform the essential functions of his job.<sup>212</sup>

On appeal, the Eighth Circuit quickly determined that the plaintiff could prove some of the elements of the *prima facie* case.<sup>213</sup> More specifically, and most important in light of the previous section of this Article, the court concluded that the plaintiff's Crohn's disease constituted a "disability" within the meaning of the ADA.<sup>214</sup> However, because TWA, and most employers, consider regular work place attendance an "essential function[]" of employment, and because the plaintiff's condition caused him to miss numerous workdays throughout his employment, the court concluded that he was not a qualified individual with a disability, and therefore he was not protected by the statute.<sup>215</sup>

In determining whether a reasonable accommodation would have allowed the plaintiff to perform the essential functions of his position, the court noted that the plaintiff failed to present evidence that a reasonable accommodation existed.<sup>216</sup> Specifically, the plaintiff's new position required face-to-face contact with customers, thus requiring regular attendance.<sup>217</sup> The court was careful to note, however, that it was not answering the question of whether requests to work at home could, in some cases, be considered "reasonable accommodations" under the ADA.<sup>218</sup>

In another district court opinion, the United States District Court for the Eastern District of New York in *Mazza v. Bratton* was asked to determine

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209. *Id.* TWA made the decision to terminate the plaintiff after the plaintiff asked for permission to return to his old position as a reservation sales agent and for permission to work from home. *Id.* The plaintiff did not, however, present evidence that such a position was available. *Id.*

210. *Id.* at 444-45. See also, Missouri Human Rights Act, MO. ANN. STAT. §§ 213.010-213.137 (West 1996).

211. *Nesser*, 160 F.3d at 445.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 445-46.

216. *Id.* at 446.

217. *Id.*

218. *Id.* See Section VII B, *infra*.

whether a plaintiff who suffered from severe ulcerative colitis was entitled to protection under the ADA and the state anti-discrimination statute.<sup>219</sup> In *Mazza*, the court granted the employer's motion for summary judgment after concluding that the plaintiff, although disabled under the ADA, was not able to establish a genuine issue of material fact regarding whether he was able to perform the essential functions of his job, with or without a reasonable accommodation.<sup>220</sup> Although the plaintiff suffered from many symptoms as a result of his severe colitis, his condition improved after using medication, and he claimed he would have been able to work at the time of his termination had he been provided with a reasonable accommodation (being able to use a restroom when needed).<sup>221</sup>

The court first addressed whether the plaintiff's condition constituted a disability within the meaning of the ADA.<sup>222</sup> The court briefly went through the three-step analysis used in making disability determinations and concluded that there was sufficient evidence that the plaintiff's colitis was a physical impairment, and that the impairment substantially limited the plaintiff's major life activities of caring for oneself, working, and controlling the elimination of waste.<sup>223</sup> The court therefore concluded that the plaintiff was a person with a disability under the statute.<sup>224</sup>

The plaintiff's claim failed, however, when the court proceeded to the next stage of the ADA analysis.<sup>225</sup> The court concluded that the plaintiff was unable to present a genuine issue of material fact as to whether he was able to perform the essential functions of his position.<sup>226</sup> Similar to the plaintiff in *Nesser*, who lost his case because he was unable to attend work,<sup>227</sup>

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219. *Mazza v. Bratton*, 108 F. Supp. 2d 167, 169-90 (E.D.N.Y. 2000). See also New York State Human Rights Law, N.Y. EXEC. LAW §§ 290-301 (McKinney 2001).

220. *Mazza*, 108 F. Supp. 2d at 176-77. The plaintiff in *Mazza* suffered from a severe case of colitis. *Id.* at 169. The extent of his illness was significant: he suffered from diarrhea, stomach cramps, nausea, gas, bowel urgency, loss of appetite, loss of weight, joint pain, hemorrhoids, fissures, fatigue, cracks in his rectal area, dehydration, and bloody stool; he also spent extended periods of time in the hospital. *Id.* at 169-70.

221. *Id.* at 170.

222. *Id.* at 173-74. The defendant argued that the plaintiff's condition did not meet this requirement, a contention the court quickly dismissed as being "without merit," especially in light of the defendant's position in front of the EEOC, which was that the plaintiff's termination was justified because he was too sick to work. *Id.* at 173.

223. *Id.* at 173-74. The court concluded that the plaintiff did not create a genuine issue of material fact with respect to whether he was substantially limited in his ability to care for himself. *Id.* at 174-75.

224. *Id.* In the alternative, the court concluded that the plaintiff, for summary judgment purposes, met the definition of being disabled because there were fact questions as to whether the employer regarded him as having a disability. *Id.* at 175.

225. *Id.*

226. *Id.*

227. *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998).

the plaintiff in *Mazza* was also unable to present evidence as to his consistent attendance.<sup>228</sup> Because work attendance is an essential function of most jobs (including the one involved in this case), the court granted summary judgment in favor of the defendant.<sup>229</sup>

*Nesser* and *Mazza* are not the only cases in which ADA plaintiffs with gastrointestinal illnesses proved their disabilities but were unable to prove their status as qualified individuals with a disability. In *Bulos v. Peoplesoft, Inc.*,<sup>230</sup> a plaintiff convinced the court that his Crohn's disease constituted a disability under the ADA and California's state-law equivalent but was ultimately unsuccessful in his case.<sup>231</sup> The plaintiff suffered from Crohn's disease and a severe type of arthritis and was forced to undergo surgery for both conditions.<sup>232</sup> These surgeries caused the plaintiff to miss work.<sup>233</sup> Although the plaintiff moved up the ranks within the company, his employer eventually terminated him, allegedly as a result of a reduction in force.<sup>234</sup> Believing his employer terminated him because of his illnesses, the plaintiff sued under the ADA and under state law.<sup>235</sup>

In spite of convincing the court that he was an individual with a disability, the plaintiff was unable to convince the court that he was a *qualified* individual with a disability.<sup>236</sup> Relying on other federal courts' holdings that regular work attendance was an essential function of many positions,<sup>237</sup> the court ultimately concluded that the plaintiff's absences and required leaves

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228. *Mazza*, 180 F. Supp. 2d at 175.

229. *Id.* at 175-76. The plaintiff's own evidence suggested to the court that despite his "conclusory statement" that he would have been able to return to work, he would not have been able to do so. *Id.* The plaintiff's doctor's notes and other documentary and factual evidence were clear that the plaintiff had a poor prognosis and that his return to work was not likely. *Id.* at 175. The plaintiff's "bald assertion" that he would have been able to work was not sufficient to overcome the employer's motion for summary judgment. *Id.* Finally, because the plaintiff could not create a genuine issue of material fact with respect to whether he actually asked for an accommodation, the court granted the defendant's summary judgment motion. *Id.* at 176.

230. *Bulos v. Peoplesoft, Inc.*, 2000 WL 868532 (N.D. Cal. June 21, 2000).

231. *Id.* at \*1, 3.

232. *Id.* at \*1-2.

233. *Id.*

234. *Id.* at \*2.

235. *Id.* The state statute under which the plaintiff brought suit was the California Fair Employment and Housing Act (FEHA). *Id.* at \*3 (referring to CAL. FAIR EMP. & HOUS. ACT, CAL. GOV'T CODE § 12900 et seq. (West 2004)).

236. *Id.* at \*3-4.

237. *Id.* at \*3; *Nesser v. Trans World Airlines*, 165 F.3d 442 (8th Cir. 1998); *Duchett v. Dunlap Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997).

of absence caused him to be unqualified for his position.<sup>238</sup> As a result, the court granted the employer's motion for summary judgment.<sup>239</sup>

In yet another case involving a plaintiff suffering from Crohn's disease, the United States District Court for the Southern District of New York in *Hardy v. The Village of Piermont, N.Y.*<sup>240</sup> granted summary judgment in favor of the employer because the plaintiff was unable to perform the essential functions of her position due to her illness.<sup>241</sup> In *Hardy*, the plaintiff, a police officer, alleged that her employer violated the Rehabilitation Act when it terminated her because she could not walk long distances or run.<sup>242</sup> The court found "no dispute" that walking long distances and running were duties of a police officer and that the plaintiff, by her own admission, was unable to perform those tasks.<sup>243</sup> The court reiterated that although an employer must make a reasonable accommodation for an employee with a disability, employers are not required to eliminate any essential job functions.<sup>244</sup> Because the plaintiff was unable to perform certain essential job functions, the court granted the employer's motion for summary judgment.<sup>245</sup>

As this section of the Article illustrates, many colitis and Crohn's disease sufferers have difficulty proving that they are qualified to perform the essential functions of their jobs due to their disabilities. Although these plaintiffs can convince courts of their disabilities, that victory is insignificant in light of the ultimate outcome of their cases. As the next section of this Article will demonstrate, at least one plaintiff lost his ADA claim as a result of the court's combining of these two hurdles ADA plaintiffs face.

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238. *Bulos*, 2000 WL 868532, at \*4.

239. *Id.* at \*3-4, 6.

240. 923 F. Supp. 604 (S.D.N.Y. 1996).

241. *Id.* at 605, 611.

242. *Id.* at 605-06.

243. *Id.* at 610. The court rejected the plaintiff's argument that the police department could have created a light duty position for her, and the court also rejected her argument that this determination was factual in nature and therefore not appropriate for summary judgment.

*Id.* This outcome appears somewhat at odds with the previously discussed case of *Stone v. City of Mount Vernon*, 118 F.3d 92, 101 (2d Cir. 1997), where the United States Court of Appeals for the Second Circuit concluded that genuine issues of material fact remained with respect to whether a paralyzed firefighter could have been assigned to a position that did not require "fire-suppression" as an essential function. Although certainly distinguishable, these cases provide one example of where an individual with an obvious disability was treated more favorably by the courts than an individual with a "hidden" impairment.

244. *Hardy*, 923 F. Supp. at 610-11.

245. *Id.* at 611.

*C. The "You're Not Sick Enough, But If You Are Sick Enough, You're Too Sick" Dilemma*

In addition to the two problems described above, one plaintiff found himself in another, extremely difficult situation. Specifically, the court in *Pangalos v. Prudential Insurance Co.*<sup>246</sup> ruled against the plaintiff *either* because he did not have a disability within the meaning of the ADA *or* because even if he did have a disability, he was not a qualified individual with a disability.<sup>247</sup> In *Pangalos*, the plaintiff suffered severe attacks of uncontrollable diarrhea, hemorrhoids, and bloody stools as a result of his severe ulcerative colitis,<sup>248</sup> and surgically removing the plaintiff's colon was the only permanent solution.<sup>249</sup> The plaintiff rejected this surgical option, believing that it was too "drastic."<sup>250</sup> The plaintiff then alleged that his employer failed to make a reasonable accommodation for his condition and therefore violated the ADA.<sup>251</sup>

The court addressed the plaintiff's symptoms and the accommodations he requested (such as a specially equipped vehicle or a transfer to a position that did not require travel)<sup>252</sup> and then addressed the issue of whether the plaintiff suffered from a disability under the ADA.<sup>253</sup> The court acknowledged that the plaintiff could have had surgery to alleviate his impairment, and the court also found it important that the plaintiff did not "seriously consider[]" a diaper or other device that would have helped alleviate his problem.<sup>254</sup> The court ultimately determined that *either* the plaintiff was not disabled "because the disabling condition he allege[d] could readily be remedied surgically,"<sup>255</sup> *or* that the plaintiff was not a qualified individual with a disability because he could not perform the

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246. No. 96-0167, 1996 U.S. Dist. LEXIS 15749 (E.D. Pa. Oct. 15, 1996), *aff'd*, 118 F.3d 1577 (3d Cir. 1997), *motion granted*, 522 U.S. 1008 (1997).

247. *Id.* at \*8. The following case description of *Pangalos* is taken from a previous article by the author. Rosenthal, *supra* note 70.

248. *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*1.

249. Rosenthal, *supra* note 70, at 453 (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*3).

250. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*3).

251. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*2).

252. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*4-5). In addition, the court addressed the accommodations the employer offered to the plaintiff, such as providing a portable toilet or allowing him to interview for other positions within the company. *Id.* at 453 n.221 (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*4-5).

253. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*4-5).

254. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*7). The plaintiff preferred not to use a diaper because of its discomfort and because he would have been required to sit in his own excrement, which would have produced rashes. *Id.* at 453 n.224 (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*6).

255. *Id.* at 453 (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*8).



essential functions of his job.<sup>256</sup> The court noted that only the plaintiff could decide whether to undergo the surgery;<sup>257</sup> of course, the court implied that the plaintiff would most likely lose protection of the Act if he chose against the surgical option.<sup>258</sup>

Therefore the *Pangalos* decision highlights the catch-22 in which plaintiffs with colitis, Crohn's disease, and many other illnesses find themselves. Even if these plaintiffs can establish a disability under the ADA, they lose their cases. Such a result occurs because they are unable to demonstrate that they can perform the essential functions of their positions and are thus not *qualified* individuals with a disability.<sup>259</sup> Although most ADA plaintiffs lose their cases because of these two issues, the next section of the Article will demonstrate that there are still other reasons why these ADA plaintiffs fail.

#### IV. OTHER CASES THAT FAILED

In addition to losing ADA and Rehabilitation Act cases because of an inability to prove a disability or to prove being a qualified individual with a disability, some plaintiffs with these diseases are losing on other grounds. For example, in *Bettis v. Department of Human Services of the State of Illinois*,<sup>260</sup> a plaintiff who suffered from Crohn's disease lost his ADA claim because he was unable to show that the accommodation he requested was a "reasonable accommodation."<sup>261</sup> The plaintiff, who underwent a total

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256. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*8).

257. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*7).

258. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*7-8). *See also* Caporilli v. City of Rome, N.Y., No. 85-CV-1320, 1992 U.S. Dist. LEXIS 22687 (N.D.N.Y. Aug. 13, 1992). In *Caporilli*, the United States District Court for the Northern District of New York determined that an individual who underwent surgery to remove his colon was not an individual with a disability under the Rehabilitation Act or the equivalent state anti-discrimination statute. Rosenthal, *supra* note 70, at 453. (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*13). The court reached this conclusion based on the fact that his surgery corrected his condition and did not significantly restrict his ability to perform any major life activities. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*10-14). Additionally, the plaintiff admitted on his medical history exam form that he had been cured of his condition. *Id.* (citing *Pangalos*, 1996 U.S. Dist. LEXIS 15749, at \*4-5).

259. *See supra* Part III.B.

260. 70 F. Supp. 2d 865 (C.D. Ill. 1999).

261. *Id.* at 865, 868. The court described the plaintiff's illness as "a condition that affects the digestive tract causing diarrhea, which in turn, makes [the plaintiff] prone to dehydration, fatigue, muscle cramps, fever, joint pain, and episodic hypokalemic paralysis." *Id.* at 865. Admittedly, this case and some of the other cases in this section of the Article could be considered under the category of cases involving plaintiffs not being qualified individuals with disabilities; however, because the issues in these cases were slightly different than the issues in that section of the Article, I placed them in a separate section.

removal of his colon as a result of his condition,<sup>262</sup> was a maintenance worker, and one of his responsibilities included performing maintenance work on laundry equipment.<sup>263</sup> Because the hot temperatures in his work environment aggravated his condition, he requested three accommodations, all of which his employer denied.<sup>264</sup> Some time later, the plaintiff applied for a transfer to another position as a reasonable accommodation, even though this position paid almost twenty thousand dollars more per year.<sup>265</sup> The employer rejected the plaintiff for this new position, and the plaintiff then filed suit under the ADA.<sup>266</sup>

The court first acknowledged that the ADA does require employers to make reasonable accommodations for employees with disabilities.<sup>267</sup> It then acknowledged that such accommodations can include reassignment to a vacant position.<sup>268</sup> Although this initial discussion appeared promising for the plaintiff, the court limited its opinion to the facts alleged by the plaintiff: that the defendant violated the ADA when it decided not to promote the plaintiff to the new position.<sup>269</sup> The court indicated that it was not addressing the issue of whether the employer had any obligation to consider any *other* reasonable accommodations, as the plaintiff did not allege an ADA violation on any basis other than the refusal to transfer to a higher-paying position.<sup>270</sup> The employer argued, and the court ultimately agreed, that although it was required to make a reasonable accommodation for the plaintiff, the ADA did not require the employer to *promote* the plaintiff.<sup>271</sup>

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262. *Id.* at 865-66.

263. *Id.* at 865.

264. *Id.* at 866. These accommodations included air conditioning, breaks, and time to cool down. *Id.*

265. *Id.*

266. *Id.* After discovery, the employer moved for summary judgment, arguing that because such a job transfer would have been a promotion, the ADA did not require the employer to provide this as a reasonable accommodation. *Id.* at 866-67.

267. *Id.*

268. *Id.* at 867. According to the C.F.R., examples of reasonable accommodations include job restructuring, part-time or modified work schedules, and reassignment to a vacant position. 29 C.F.R. § 1630.2(o)(2) (2002).

269. *Bettis*, 70 F. Supp. 2d at 867.

270. *Id.*

271. *Id.* at 867-68. The employer argued that because the position to which the plaintiff wished to be transferred paid almost twenty thousand dollars more per year, that transfer constituted a promotion and therefore was not required under the ADA because it would have caused an undue hardship. *Id.* at 867. Although employers are required to make *reasonable* accommodations for employees with disabilities, employers are not required to do so if such an accommodation would pose an "undue hardship" on the employer. 42 U.S.C. § 12112(b)(5)(A) (2000). Whether an accommodation would cause an undue hardship is based on a variety of factors, such as the cost of the accommodation, the size and resources of the employer, and the impact of the accommodation on the employer's operations. 29 C.F.R. § 1630.2(p)(2) (2002).

The plaintiff agreed that the transfer would have constituted a promotion, but made the “beside the point and confusing” argument that because the employer’s own policies did not prohibit such a transfer as a reasonable accommodation, the ADA’s “no promotion” rule did not apply to this case.<sup>272</sup>

The court rejected the plaintiff’s argument and concluded that the promotion did not constitute a reasonable accommodation.<sup>273</sup> The court first observed that the ADA does not require an employer to provide the accommodation the employee requests; it only requires an employer to provide a reasonable accommodation.<sup>274</sup> Second, the court reasoned that simply because the employer had a policy of allowing promotions, this did not demonstrate that the promotion the plaintiff requested was a “reasonable accommodation.”<sup>275</sup> In connection with this statement, the court observed that the ADA does not require employers to promote employees.<sup>276</sup> The court then noted that the ADA was not intended to be an “affirmative action” piece of legislation used to benefit employees with disabilities,<sup>277</sup> rather, the ADA was only intended to “level the playing field” for individuals who suffered past discrimination based on their disabilities.<sup>278</sup> Therefore, the court determined that the employer did not violate the ADA when it denied the promotion to the ADA plaintiff.<sup>279</sup> This is just one more case where an employee who was able to overcome the initial hurdle of establishing a disability under the ADA was ultimately unsuccessful because he could not prevail at a later stage of the ADA analysis.<sup>280</sup>

The United States Court of Appeals for the Ninth Circuit also addressed the reasonable accommodation aspect of an ADA claim brought by a

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272. *Bettis*, 70 F. Supp. 2d at 867.

273. *Id.* at 868.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 865-68. See also *Wilder v. Southeastern Pub. Serv. Auth.*, 869 F. Supp. 409 (E.D. Va. 1994), *aff’d*, 69 F.3d 534 (4th Cir. 1995). In *Wilder*, the court found the plaintiff’s Crohn’s disease was indeed a disability under the Act, but held that the plaintiff was unable to prove discrimination on the basis of his disability. *Id.* at 417-418. Additionally, the court went on to observe that even if the plaintiff was able to demonstrate disability-based discrimination, his claim still would have failed because he was not a *qualified* individual with a disability. *Id.* at 418. The court reached this conclusion because the plaintiff was absent for more than four months in a thirty-six month period. *Id.* Relying on the Fourth Circuit’s opinion in *Tyndall v. Nat’l Educ. Ctrs., Inc.*, 31 F.3d 209 (4th Cir. 1994), which held that regular and reliable attendance was a necessary requirement for most jobs, the court concluded that the plaintiff was unable to perform that function and was therefore not a qualified employee. *Wilder*, 869 F. Supp. at 418.

plaintiff suffering from Crohn's disease when it decided *Patterson v. City of Seattle*.<sup>281</sup> In *Patterson*, the Ninth Circuit was asked to determine whether a plaintiff's request that he be moved away from a former supervisor who had previously harassed him was a request for a "reasonable accommodation" under the ADA and its state law equivalent.<sup>282</sup> The lower court had granted the employer's motion for summary judgment on this issue, and the plaintiff appealed.<sup>283</sup>

In *Patterson*, after prevailing in a retaliation claim in a previous lawsuit alleging harassment and retaliation at the workplace, the plaintiff lost his job and was later re-hired by the Seattle Water Department.<sup>284</sup> Eventually, the supervisor whom the plaintiff alleged had previously harassed him was transferred to the same building as the plaintiff.<sup>285</sup> As a result of this transfer, the plaintiff informed his supervisor that he was ill and was suffering from Crohn's disease.<sup>286</sup> The plaintiff then left his position and never returned.<sup>287</sup>

Prior to attempting to return to his job, the plaintiff had made a request for three accommodations under the ADA.<sup>288</sup> Specifically, the plaintiff asked his employer: (1) if it could provide him with an adequate workplace; (2) if it could provide him with adequate equipment for him to perform his job; and, most importantly, (3) if it could remove his former supervisor from the building in which they both would have worked had the plaintiff returned to work.<sup>289</sup> The plaintiff also suggested other alternatives that would have allowed him and his former boss to avoid each other.<sup>290</sup> Although the city granted the first two of the plaintiff's requests, it did not agree to provide the accommodation regarding the plaintiff's former supervisor's presence in the same building.<sup>291</sup> Because the city failed to grant the plaintiff's final request, the plaintiff did not return to work and eventually sued, alleging that the failure to separate the two employees constituted a failure to reasonably accommodate the plaintiff's Crohn's disease.<sup>292</sup>

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281. No. 95-35487, 1996 U.S. App. LEXIS 24667 (9th Cir. Sept. 17, 1996).

282. *Id.* at \*4-6.

283. *Id.* at \*2.

284. *Id.* at \*3.

285. *Id.* at \*4.

286. *Id.*

287. *Id.*

288. *Id.* at \*5.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

The plaintiff's lawsuit alleged violations of the ADA and Washington's anti-discrimination statute.<sup>293</sup> The Ninth Circuit concluded that the plaintiff was unable to make the requisite facial showing that an accommodation was required to permit him to perform the essential functions of his position;<sup>294</sup> therefore, the Ninth Circuit affirmed the lower court's granting of summary judgment in the employer's favor.<sup>295</sup>

As the above-described cases demonstrate, plaintiffs suffering from gastrointestinal disorders such as colitis and Crohn's disease have not been successful when bringing ADA claims.<sup>296</sup> The catch-22 of being "not sick enough" or "too sick" proves quite troublesome, and presents a typical difficulty for many ADA plaintiffs.<sup>297</sup> Additionally, ADA plaintiffs with gastrointestinal illnesses have lost their cases on other grounds as well.<sup>298</sup> However, despite these hurdles, some plaintiffs have achieved some success, although many times the success has been short-lived.<sup>299</sup>

## V. SHORT-LIVED VICTORIES

One of the first cases where a plaintiff won an initial victory but ultimately lost her case was *Kling v. County of Los Angeles*.<sup>300</sup> In *Kling*, the Ninth Circuit ruled in favor of the plaintiff on two separate occasions, but the United States Supreme Court reversed.<sup>301</sup> Curiously, the Supreme Court provided no explanation for its decision, but the ultimate outcome was a denial of relief under the ADA to a plaintiff suffering from a gastrointestinal disease.<sup>302</sup>

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293. *Id.* at \*2. The state statute at issue was the Washington Law Against Discrimination. WASH. REV. CODE ANN. § 49.60 (West 2002).

294. *Patterson*, 1996 U.S. App. LEXIS 24667, at \*8. Specifically, although the plaintiff was able to present evidence that stress aggravated Crohn's disease, and that his being "continuously exposed" to his former supervisor would exacerbate his condition, the court determined that there was no evidence that the plaintiff would be "continuously exposed" to his former supervisor even if they did work in the same building. *Id.* at \*8-9. The court noted that the two individuals did not work in the same department or on the same floor, and that the two were no longer in any type of supervisor/subordinate relationship. *Id.* The court determined that the "mere possibility" of running into his former supervisor was not enough to require the employer to provide the requested accommodation. *Id.* at \*9.

295. *Id.* at \*2.

296. *See supra* Part III.

297. *See supra* Part III.

298. *See supra* Part IV.

299. *See infra* Part V.

300. 769 F.2d 532 (9th Cir. 1985), *rev'd*, 474 U.S. 936 (1985).

301. *See* 633 F.2d 876 (9th Cir. 1980); 769 F.2d 532 (9th Cir. 1985); 474 U.S. 936 (1985).

302. *See Kling*, 474 U.S. 936 (reversing *County of Los Angeles v. Kling*, 769 F.2d 532 (9th Cir. 1985)).

In *Kling*, the plaintiff suffered from Crohn's disease and sued various defendants when she was denied admission to a school's nursing program.<sup>303</sup> The plaintiff alleged this rejection was because of her Crohn's disease and brought an action under the Rehabilitation Act (the ADA had not yet been passed).<sup>304</sup> The district court initially denied the plaintiff's request for an order requiring the school to admit her to its nursing program, a decision appealed to the Ninth Circuit.<sup>305</sup> The Ninth Circuit reversed and concluded that because the plaintiff had a likelihood of success on the merits of her claim, an order requiring the school to admit the plaintiff was appropriate.<sup>306</sup>

The school's position was not that the plaintiff was unable to meet the school's requirements; rather, the school argued that the plaintiff's illness would require her to miss a large number of classes.<sup>307</sup> The plaintiff's doctor testified that she could attend the classes, and that the plaintiff could minimize any conflicts with her schooling, even in the event of hospitalization.<sup>308</sup> The Ninth Circuit concluded that the testimony sufficiently showed a probability of success on the merits, and justified an injunction forcing the school to admit the plaintiff.<sup>309</sup>

The plaintiff was also successful on her second appeal to the Ninth Circuit.<sup>310</sup> After the Ninth Circuit's initial decision, the trial court found that the plaintiff was not a handicapped person under the Rehabilitation Act, she was not discriminated against in violation of the Rehabilitation Act, and that the plaintiff did not suffer any compensable harm as a result of her rejection.<sup>311</sup> The Ninth Circuit, noting that the evidence at the trial was not substantially different than the evidence it considered when it originally

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303. *Kling*, 633 F.2d at 877. The plaintiff in *Kling* was originally accepted into the defendant's nursing program and attended orientation. *Id.* The plaintiff eventually underwent a physical examination and was told that she could not enroll in the program. *Id.*

304. *Id.* at 877. The plaintiff sued the school, seeking injunctive and declaratory relief, but the district court ruled that because she had failed to exhaust her administrative remedies, her claim failed. *Id.* at 877-78.

305. *Id.*

306. *Id.* at 879-80. First, the Ninth Circuit quickly concluded that the plaintiff's Crohn's disease was a handicap under the Rehabilitation Act. *Id.* at 878. Second, the court concluded that the Rehabilitation Act did provide for a private cause of action. *Id.* Third, the court determined that although the plaintiff did not exhaust her administrative remedies, she was not required to do so because that would not have afforded the plaintiff adequate relief. *Id.* at 879. Finally, after the Ninth Circuit addressed these preliminary matters, it addressed the merits of the plaintiff's Rehabilitation Act claim. *Id.* at 879-80.

307. *Id.* at 879.

308. *Id.*

309. *Id.* at 879-80. After the Ninth Circuit ordered it to do so, the school agreed to admit the plaintiff, but the school was not willing to accept the transfer credits the plaintiff had earned at another school during the initial litigation. *Kling*, 769 F.2d 532, 533 (9th Cir. 1985).

310. *Kling*, 769 F.2d 532, 533 (9th Cir. 1985).

311. *Id.*

ruled in the plaintiff's favor, again ruled in favor of the plaintiff.<sup>312</sup> Specifically, the Ninth Circuit found the district court's holding was clearly erroneous, that the plaintiff was indeed an otherwise qualified handicapped individual, and that the school rejected her solely because of her illness.<sup>313</sup> The Ninth Circuit therefore reversed the district court again.<sup>314</sup>

Although the plaintiff was once again victorious at the Court of Appeals, the United States Supreme Court reversed without a written opinion.<sup>315</sup> The end result was the same: another sufferer of a gastrointestinal illness was denied relief under a federal statute aimed at prohibiting disability-based discrimination.<sup>316</sup>

The plaintiff in *Kling* was not the only plaintiff to suffer such a fate. In *Davis v. Guardian Life Ins. Co.*,<sup>317</sup> the United States District Court for the Eastern District of Pennsylvania first denied the employer's motion for summary judgment on an ADA claim, but then, after the plaintiff won at trial, granted the employer's motion for judgment as a matter of law.<sup>318</sup> In *Davis*, the plaintiff suffered from Crohn's disease and had requested accommodations from her employer, which would have allowed the plaintiff to spend less time in the office and more time at home.<sup>319</sup> After a meeting, the parties agreed to modify the plaintiff's work schedule to allow her to work at home some days of the week.<sup>320</sup> Additionally, the employer agreed to provide the plaintiff with computer access while working at home.<sup>321</sup> Despite this schedule, there was evidence that the plaintiff missed numerous workdays.<sup>322</sup>

312. *Id.* at 533-34.

313. *Id.* at 533. The Ninth Circuit concluded:

The school's physician . . . rejected Kling because she suffers from Crohn's Disease. He assumed that merely because of her disease she would be unable to complete the school's program. He did not evaluate her on an individual basis and even testified that had he known more about Kling's medical history, he would have been "swayed very strongly toward acceptance." It is precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid.

*Id.* at 533-34.

314. *Id.* at 534.

315. *County of Los Angeles v. Kling*, 474 U.S. 936 (1985). In his dissenting opinion, Justice Stevens criticized the Court for reversing the Ninth Circuit without providing an explanation for doing so. *Id.* at 937-40 (Stevens, J., dissenting).

316. *See id.*

317. No. 98-5209, 2000 U.S. Dist. LEXIS 719 (E.D. Pa. Feb. 1, 2000).

318. *Davis v. Guardian Life Ins. Co.*, No. 98-5209, 2000 U.S. Dist. LEXIS 18166 (E.D. Pa. Dec. 15, 2000).

319. *Id.* at \*2-3.

320. *Id.* at \*3.

321. *Id.*

322. *Id.* Whether the plaintiff was absent from work because of her Crohn's disease or due to maternity leave was disputed. *Id.*

After the plaintiff's manager realized that the schedule was not effective, he asked the plaintiff to commit to a definite schedule, which required her presence in the office on two particular days per week.<sup>323</sup> Because of the unpredictable nature of the plaintiff's illness, the plaintiff was reluctant to agree to such a schedule, and asked that she be allowed to work exclusively from home on the days when her Crohn's disease was acting up.<sup>324</sup> The employer denied this request and the plaintiff went on disability leave.<sup>325</sup> As a result, the plaintiff filed her complaint, alleging violations of both the ADA and the Pennsylvania state law equivalent.<sup>326</sup>

After setting out the proper analytical framework for analyzing an ADA dispute, the court acknowledged that the plaintiff's Crohn's disease was indeed a disability.<sup>327</sup> In its motion, the defendant argued that the plaintiff was unable to demonstrate that she was a qualified individual with a disability because she could not perform the essential functions of her job commuting to the office two days per week.<sup>328</sup> The employer also argued that the ADA did not require it to allow the plaintiff to stay at home continuously throughout the periods in which the disease flared up.<sup>329</sup>

The court acknowledged that an employer has discretion in determining a position's essential functions, and that this determination deserves some weight.<sup>330</sup> Additionally, although both parties agreed that allowing the plaintiff to work at home two days per week was a reasonable accommodation, the plaintiff contended that the employer's attempt to develop a specific schedule was the employer's way of forcing her out of her position.<sup>331</sup> The employer contended that the nature of the plaintiff's position required her attendance at the office at least two scheduled days per week, and that her absence would render her unable to perform this essential function.<sup>332</sup>

At the summary judgment stage, the court rejected the employer's contention and concluded there was at least a triable question of fact on that issue.<sup>333</sup> Specifically, the court looked at the fact that the defendant did

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323. *Id.*

324. *Id.*

325. *Id.* at \*4-5.

326. *Id.* at \*1-2. The state statute under which the plaintiff brought suit was the Pennsylvania Human Relations Act (PHRA). *Id.* at \*1 (referring to PA. HUMAN RELATIONS ACT, 1 PA. CONS. STAT. ANN. § 951 et seq. (West 2004)).

327. *Id.* at \*8-10.

328. *Id.* at \*10-11.

329. *Id.* at \*11.

330. *Id.* at \*11-12.

331. *Id.* at \*12.

332. *Id.* at \*12-13.

333. *Id.* at \*14-15.



not have any specific days during which training sessions took place (thereby not requiring mandatory attendance on those days), and the plaintiff had been able to schedule according to her illness in the past.<sup>334</sup> The court ultimately determined that a jury could conclude that the employer's set schedule requirement was unnecessary.<sup>335</sup>

Despite this initial victory, the plaintiff's success was short-lived.<sup>336</sup> After the plaintiff prevailed at trial, the court granted the employer's post-trial motion for judgment as a matter of law because the plaintiff failed to engage in the required "interactive process" to decide upon a reasonable accommodation.<sup>337</sup> Because the plaintiff simply rejected her employer's most recent accommodation proposal, the employer was not liable for an ADA violation.<sup>338</sup>

Thus, as this section of the Article has demonstrated, colitis and Crohn's disease plaintiffs under the ADA lose their cases on various grounds other than their inability to prove a disability and their inability to prove being a qualified individual. Even when some of these plaintiffs have experienced some mild success, those victories have been short-lived.<sup>339</sup> This is certainly not unique to individuals with these gastrointestinal disorders; rather, it is typical of the uphill battle all ADA plaintiffs currently fight.<sup>340</sup>

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334. *Id.*

335. *Id.* The court concluded that the conflicting evidence required a denial of the motion for summary judgment. *Id.* at \*15. The court also concluded that fact questions remained regarding the plaintiff's request that she be allowed to stay at home during periods when her Crohn's disease flared up, and it therefore determined that summary judgment was inappropriate. *Id.* at \*19.

336. *See id.* at \*24.

337. *Id.* at \*17-18 (relying on 29 C.F.R. § 1630.2(o)(3)).

338. *Id.* at \*20.

339. In addition to the cases discussed in this section of the Article, other cases demonstrate the legal failures of plaintiffs with gastrointestinal disorders. *E.g.*, *Finnicum v. Evant, Inc.*, No. 98-3347, 1999 U.S. App. LEXIS 9849 (6th Cir. 1999) (Unpublished) (affirming summary judgment in favor of the employer because the plaintiff, who suffered from a "gastrointestinal problem" and psychological problems, did not satisfy the definition of disability); *Adams v. City of Los Angeles*, No. 96-55938, 1997 U.S. App. LEXIS 15457 (9th Cir. 1997) (Unpublished) (affirming summary judgment in favor of the employer because the plaintiff's perianal fistulae did not constitute a disability under the Act); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355 (8th Cir. 1997) (holding that the ADA plaintiff's stomach problems and loss of appetite were not disabilities under the Act); *Powell v. Fluor Daniel, Inc.*, No. 95-3212, 1997 U.S. App. LEXIS 835 (4th Cir. 1997) (Unpublished) (affirming jury verdict against the ADA plaintiff who suffered from a "severe gastrointestinal disorder"); *Miranda v. Wisc. Power & Light Co.*, 91 F.3d 1011, 1013, 1018 (7th Cir. 1996) (rejecting the plaintiff's ADA constructive discharge/hostile environment claim based on the plaintiff's diverticulosis, which the court described as an "intestinal disorder characterized by the presence of small, pouch-like sacs (diverticula) protruding from the intestine").

340. *See Colker, A Windfall for Defendants*, *supra* note 8; *Colker, Winning and Losing under the ADA*, *supra* note 8.

## VI. SOME MILD SUCCESSES

Although most people suffering from colitis or Crohn's disease have failed in their ADA or Rehabilitation Act claims, a few plaintiffs have experienced some success.<sup>341</sup> Most of this success has come either at the very preliminary stages of litigation or has been of a very limited nature.<sup>342</sup> For example, after appealing the lower court's granting of the employer's motion to dismiss, the plaintiff in *Equal Employment Opportunity Commission v. Browning-Ferris, Inc.*<sup>343</sup> convinced the United States Court of Appeals for the Fourth Circuit to reverse the lower court's judgment and remand the case for further proceedings.<sup>344</sup>

In *Browning-Ferris*, the issue before the Fourth Circuit was whether the plaintiff's allegations sufficiently established that she had a disability under the ADA.<sup>345</sup> The plaintiff,<sup>346</sup> who suffered from Crohn's disease, alleged that her former employer perceived her as having a disability under the ADA.<sup>347</sup> The district court granted the employer's motion to dismiss, concluding that the plaintiff failed to allege that she was substantially limited in her ability to perform a class of jobs or a broad range of jobs, a prerequisite for prevailing in a claim that a plaintiff was substantially limited in the major life activity of working.<sup>348</sup>

Focusing on two issues, the Fourth Circuit reversed.<sup>349</sup> First, the court examined whether the district court read the plaintiff's complaint too narrowly, and second, the court examined whether "working around waste" satisfied the major life activity of working.<sup>350</sup> The Fourth Circuit concluded that the district court read the plaintiff's complaint too narrowly and that the plaintiff should have been given the opportunity to prove that her employer regarded her as being substantially limited in a major life activity

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341. As discussed earlier in this Article, not every ADA plaintiff with one of these ailments deserves to win his ADA claim. However, this Article highlights the problems so many ADA plaintiffs with gastrointestinal and other "hidden" illnesses face when attempting to pursue a claim under the ADA.

342. One other example of a published opinion in which a plaintiff with Crohn's disease experienced a slight victory was *Jones v. Hodel*, 711 F. Supp. 1048 (D. Utah 1989). The court denied the employer's motion for summary judgment, concluding that although the doctrine of equitable tolling did not save the plaintiff's Rehabilitation Act claim, there was a genuine issue of material fact about whether the employer waived that defense. *Id.* at 1054.

343. No. 99-2413, 2000 U.S. App. LEXIS 18273 (4th Cir. 2000).

344. *Id.* at \*11.

345. *Id.* at \*5.

346. *Id.* at \*1-2. The Equal Employment Opportunity Commission filed on behalf of the employee, thereby proceeding as the actual plaintiff. *Id.*

347. *Id.* at \*2-3.

348. *Id.* at \*3-4.

349. *Id.* at \*11.

350. *Id.* at \*7-10.

other than working.<sup>351</sup> The court also found that the plaintiff met the notice pleading requirements of the Federal Rules of Civil Procedure when she alleged that the employer “placed [the plaintiff] on unpaid leave and shortly thereafter terminated her based upon [the employer’s] perception that she was disabled.”<sup>352</sup>

The Fourth Circuit then addressed whether the plaintiff’s allegations regarding the plaintiff’s ability to work around waste sufficiently alleged an inability to perform the major life activity of working.<sup>353</sup> The court noted that to satisfy the requirement of a substantial limitation in the major life activity of working, an ADA plaintiff must demonstrate an inability to perform a *class* or a wide range of jobs;<sup>354</sup> it was not sufficient to allege that she could not perform *one type* of specialized job.<sup>355</sup> Although acknowledging that this was a close case, the court concluded that “‘working around waste’ could conceivably cover a broad range of jobs, including a host of positions wholly separate from the waste removal industry.”<sup>356</sup> Therefore, the Fourth Circuit reversed the lower court’s granting of the employer’s motion to dismiss and remanded the case to allow the plaintiff to present evidence that the employer regarded the plaintiff as being substantially limited in her ability to work.<sup>357</sup> This presents one example of a plaintiff suffering from a gastrointestinal disorder who defeated an employer’s motion to dismiss.<sup>358</sup> Although this case was certainly not a victory on the merits, this plaintiff was at least able to keep her claim alive.<sup>359</sup>

Because these preliminary victories are not ultimate victories on the merits, plaintiffs with these disorders must still determine how to pursue

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351. *Id.* at \*7-8.

352. *Id.* at \*8.

353. *Id.* at \*6-11.

354. *Id.* at \*7-10.

355. *Id.* at \*9-10.

356. *Id.* at \*10.

357. *Id.* at \*11.

358. For another example of where a plaintiff with a gastrointestinal disease experienced some success, see *Workman v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999). In *Workman*, the appellate court did not disturb the jury’s finding that the plaintiff’s condition of spastic colon (a condition typically less severe than colitis or Crohn’s disease) constituted a disability under the ADA. *Id.* at 463, 469.

359. For other examples of cases where the plaintiffs were able to win preliminary victories, see *Seery v. Biogen, Inc.*, 203 F. Supp. 2d 35, 47 (D. Mass. 2002) (holding that the plaintiff’s claim was not time-barred); *Westinghouse Elec. Supply Corp. v. Mass. Comm’n Against Discrimination*, No. 97-4267E, 1999 Mass. Super. LEXIS 65, at \*25-26 (March 5, 1999) (holding under state law that the plaintiff, who suffered from Crohn’s disease, had a disability); *Winokur v. Office of Ct. Admin.*, 190 F. Supp. 2d 444, 448-49, 452 (E.D.N.Y. 2002) (holding that part of the plaintiff’s claim survived a motion to dismiss because the plaintiff did allege a substantial limitation on a major life activity).

other avenues that will provide them with a greater possibility of obtaining relief. Although the ADA was meant to benefit people with disabilities, plaintiffs with these gastrointestinal illnesses (and other illnesses) might have to look elsewhere to obtain relief for the adverse employment actions they suffer as a result of their conditions. In the alternative, they will have to convince courts to adopt a more liberal interpretation of the ADA—a possibility unlikely to occur in the near future.

## VII. POTENTIAL SOLUTIONS TO THE PROBLEM

Because plaintiffs with these conditions are losing their cases predominantly at two stages—the disability stage and the qualified individual with a disability stage—plaintiffs must develop a way to overcome these two hurdles. They must first determine how to convince the courts that they have a “disability” under the ADA (or Rehabilitation Act), and then they must determine how to convince the courts that despite these disabilities, they are indeed able to perform the essential functions of their positions. Because the Supreme Court and Congress are unlikely to broaden the ADA’s scope, the outlook appears quite bleak for these plaintiffs.<sup>360</sup> However, some avenues exist that these plaintiffs might pursue to obtain some legal remedy for the adverse employment actions they experience as a result of their illnesses.

### A. *Attempt to Assert State Law Claims and Other Federal Law Claims*

The Americans with Disabilities Act is the *federal* law that attempts to create equal opportunities for employees with disabilities. However, in addition to the ADA (and the Rehabilitation Act), *state* laws also serve that same purpose. Although many of the plaintiffs discussed in this Article brought parallel state law claims and also failed under those claims, some state anti-discrimination laws apply more liberally than the federal anti-discrimination statutes.<sup>361</sup> Although this is the exception rather than the

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360. Although Congress is unlikely to act on this specific issue, Congress has, in the past, acted in response to Supreme Court decisions in the employment discrimination context. Specifically, in passing the Civil Rights Act of 1991, Congress was responding to the Supreme Court’s decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989). *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1213 (10th Cir. 2002) (acknowledging that the Civil Rights Act of 1991 overruled *Price Waterhouse*); *Zubi v. AT&T Corp.*, 219 F.3d 220, 224 (3d Cir. 2000) (same); *Allen v. Entergy Corp.*, 193 F.3d 1010, 1015 (8th Cir. 1999) (noting that the Civil Rights Act of 1991 expressly amended Title VII to overrule *Wards Cove*); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993) (same).

361. For example, as will be discussed later in this Article, the Supreme Judicial Court of Massachusetts has interpreted that state’s anti-discrimination statute, Massachusetts General Laws ch. 151B, more broadly than how the federal courts are now required to interpret the ADA. See MASS. GEN. LAWS ANN. ch. 151B, § 1 et seq. (West 2004).

rule, ADA plaintiffs should certainly investigate this possibility by analyzing state anti-discrimination laws.

One such area where state law might respond favorably to disability discrimination plaintiffs is in the determination of what constitutes a disability. The Supreme Court has dramatically narrowed this definition since the effective date of the employment provisions of the ADA,<sup>362</sup> however, some state courts have been more generous when interpreting the definition of disability under the state law equivalent of the ADA. One of the states to adopt a more plaintiff-friendly definition of the term "disability" is Massachusetts.<sup>363</sup> Three years after *Sutton*, the Supreme Judicial Court of Massachusetts decided to reject the United States Supreme Court's narrow interpretation of the definition of disability when resolving a case under the Massachusetts law prohibiting discrimination against individuals with disabilities.<sup>364</sup> Specifically, in *Dahill v. Police Department of Boston*,<sup>365</sup> the court decided *against* considering mitigating measures when determining whether an individual suffers from a disability, despite the fact that the relevant definitions of the Massachusetts anti-discrimination statute nearly mirrored the ADA's definitions.<sup>366</sup>

In *Dahill*, the court looked at whether a hearing-impaired police officer had a handicap within the meaning of Massachusetts's anti-discrimination statute.<sup>367</sup> The plaintiff filed suit under both state and federal law when the police department terminated his employment after concluding that the plaintiff's hearing impairment rendered him "incapable of effectively and safely performing the essential duties of a Police Officer."<sup>368</sup> One of the issues the Supreme Judicial Court addressed was whether the plaintiff suffered from a handicap within the meaning of the Massachusetts anti-discrimination statute.<sup>369</sup> Because the Massachusetts statute was not clear

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362. See *supra* note 67.

363. See *Dahill v. Police Dep't of Boston*, 748 N.E.2d 956 (Mass. 2001). The state statute at issue in *Dahill* used the term "handicap" instead of "disability." See *id.* at 957. For purposes of this section of the Article, those terms are interchangeable.

364. *Id.* at 964. The state statute involved in that case was Massachusetts General Laws, chapter 151B section 1.

365. 748 N.E.2d 956 (Mass. 2001).

366. *Id.* at 964.

367. *Id.* at 958-59.

368. *Id.* Although he was born with a very severe hearing impairment, with the use of hearing aids, the plaintiff's hearing fell "within normal limits." *Id.* at 958. In fact, the plaintiff had been quite successful despite his hearing impairment, graduating from both college and law school. *Id.*

369. *Id.* at 959. The police department argued that the Supreme Judicial Court of Massachusetts should adopt the U.S. Supreme Court's interpretation of "disability" from *Sutton* (and therefore consider mitigating measures when making the initial disability

on its face, the Supreme Judicial Court looked at other sources to determine the legislative intent behind the statute.<sup>370</sup> After reviewing the Rehabilitation Act in the context of the enactment of Massachusetts state law, the guidance offered by the Massachusetts Commission Against Discrimination, and the fact that the Massachusetts Legislature intended a liberal construction of the anti-discrimination statute, the Supreme Judicial Court decided *against* considering mitigating measures when assessing whether an individual suffers from a disability under state law.<sup>371</sup>

The court offered two reasons for a more liberal interpretation of the Massachusetts state law than the Supreme Court's construction of the ADA in *Sutton*.<sup>372</sup> First, unlike the EEOC, which did not have the authority to implement regulations interpreting or implementing the generally applicable ADA provisions, the Massachusetts Commission Against Discrimination had such authority with respect to the Massachusetts statute.<sup>373</sup> As a result, its interpretation of the state statute (which required courts to *ignore* mitigating measures when determining disability status) was entitled to deference.<sup>374</sup> Also, unlike the ADA, which indicated that forty-three million Americans suffered from disabilities, the Massachusetts statute did not indicate a specific number of individuals targeted by the statute, and therefore the court did not find legislative intent to limit the state statute's application.<sup>375</sup> Because of these factors, the court rejected the *Sutton* approach and determined that mitigating measures should *not* be considered when determining disability status under Massachusetts law.<sup>376</sup> Of course, the Supreme Judicial Court pointed out that this determination did not answer the ultimate question in these disability discrimination cases: whether the plaintiff can ably perform the essential functions of the position with or without a reasonable accommodation.<sup>377</sup>

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determination), while the plaintiff argued that the court should reject that very narrow interpretation and ignore mitigating measures. *See id.*

370. *Id.* at 960.

371. *Id.* at 960-63.

372. *Id.* at 963-64.

373. *Id.* at 963. The specific authority-granting provisions of the Massachusetts anti-discrimination statute are §§ 2-3 of Massachusetts General Laws ch. 151B. *See* MASS. GEN. LAWS ANN. ch. 151B, §§ 2-3 (West 2004).

374. *Dahill*, 748 N.E.2d at 961-62.

375. *Id.* at 963.

376. *Id.* at 963-64. *See also* *Antonsen v. Ward*, 571 N.E.2d 636 (N.Y. 1991). There, the Court of Appeals of New York concluded that an employee with Crohn's disease satisfied the statute's definition of "disability." *Id.* at 639. However, the relevant definition of "disability" in *Antonsen* was much more liberal than the ADA's definition of "disability" because it did not require a substantial limitation on a major life activity. *See id.* at 639. Specifically, the relevant statute defined "disability" as "a physical or mental impairment, a record of such an impairment or a condition regarded by others as an impairment." *Id.*

377. *Dahill*, 748 N.E.2d at 964.

Therefore, when a victim of colitis or Crohn's disease, or any disease for that matter, attempts to bring a disability-based discrimination lawsuit against a former or current employer, he should also investigate the applicable state anti-discrimination statute. Although most courts interpret state statutes in a manner consistent with *Sutton*, the *Dahill* opinion might assist potential plaintiffs to argue more persuasively for different interpretations of state and federal statutes. While this strategy does nothing to broaden the scope of the ADA, or to increase the likelihood of success in an ADA claim, it might supply a more viable approach to recovery.

If state law remedies also prove difficult for plaintiffs to establish disabilities, these individuals might have some additional remedies under federal law. Specifically, they might pursue federal disability benefits under the Social Security Act,<sup>378</sup> or pursue a claim under the Family Medical Leave Act of 1993.<sup>379</sup> Although these federal statutes have distinct requirements and different possible benefits,<sup>380</sup> they might provide some relief to individuals suffering from these illnesses who cannot find any protection under the ADA. Therefore, all potential ADA plaintiffs must consider filing state law claims as well as claims brought under other federal statutes. Although this will not help broaden the protection afforded by the ADA, it might provide much needed relief to individuals suffering from these illnesses.

### *B. Take a More Serious Look at "Home Work"*

As discussed in Part III.B, even though some plaintiffs are able to convince courts that they have a disability under the ADA or its state-law equivalent, they still lose their cases because they can not establish that they are *qualified* individuals with a disability. One possible way to perhaps be more successful on this issue is to convince the federal courts that working at home is a reasonable accommodation worthy of more careful exploration.<sup>381</sup> With technology making this a more attractive and feasible possibility, courts might be more inclined to consider this option in these types of ADA cases. If courts become more willing to consider "home work" as a reasonable accommodation under the ADA, plaintiffs will be better able to prove their status as qualified individuals with disabilities, and thus be more successful when bringing ADA actions. Although the "home

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378. 42 U.S.C. § 423 (2000).

379. 29 U.S.C. §§ 2601-2654 (2000).

380. See 42 U.S.C. § 423 (2000); 29 U.S.C. §§ 2601-2654 (2000).

381. As was mentioned earlier, the C.F.R. provides examples of reasonable accommodations such as job restructuring, modified work schedules, and transfers to vacant positions. 29 C.F.R. § 1630.2 (o)(2).

work” approach failed in some of the cases previously discussed in this Article,<sup>382</sup> the possibility was raised by the United States District Court for the Eastern District of New York in *Harris v. Chater*.<sup>383</sup> Although *Harris* was not a case brought under the ADA, the opinion raises the possibility of “home work” as an available option more employers (and employees) should consider.<sup>384</sup> In *Harris*, the Social Security Commissioner was appealing the reversal of a determination that the plaintiff was not entitled to Social Security disability benefits.<sup>385</sup> The claimant suffered from a severe case of Crohn’s disease, among other impairments, and attempted to receive disability benefits.<sup>386</sup> After determining that the commissioner did not properly follow established rules for determining entitlement, the court concluded that the plaintiff was entitled to the benefits.<sup>387</sup>

Most relevant to the issue raised in this section of this Article was the court’s discussion of “home work” as an option for employees unable to function in a traditional workplace.<sup>388</sup> Although the court addressed this issue in the context of Social Security disability benefits, the court’s discussion emphasized how employers could utilize “disabled” employees in non-traditional ways.<sup>389</sup> In addition to listing the types of jobs an individual such as the plaintiff could perform at home (internet research, telemarketing, editing, and data entry), the court also noted, “private employers may not be fully accessing the rich resource of home-bound persons seeking employment.”<sup>390</sup> Perhaps employers who more fully explored this possibility would see this type of arrangement as a reasonable accommodation under the ADA.<sup>391</sup> Therefore, if courts willingly broaden the concept of reasonable accommodation, this “home work” approach will

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382. See *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998); *Davis v. Guardian Life Ins. Co.*, No. Civ. A. 98-5209, 2000 U.S. Dist. LEXIS 719, at \*12-16 (E.D. Pa. Feb. 1, 2000).

383. 998 F. Supp. 223 (E.D.N.Y. 1998).

384. *Id.* at 228. One of the other issues raised in *Harris* was whether an employee’s assertion that he is unable to work (for purposes of obtaining Social Security benefits) should disqualify him from arguing that he is a qualified individual with a disability under the ADA. *Id.* at 228-29. The Supreme Court has since resolved that issue, concluding that those two positions are not mutually exclusive and that Social Security claimants who assert an inability to work are not necessarily precluded from arguing that they are qualified individuals with disabilities under the ADA. *Cleveland v. Policy Mgmt. Sys. Corp.* 526 U.S. 795 (1999).

385. *Harris*, 998 F. Supp. at 223-24.

386. *Id.* at 224.

387. *Id.* at 227.

388. *Id.* at 227-28.

389. *Id.* at 228.

390. *Id.*

391. Of course, this could result in a double-edged sword because the increased acceptance of “home work” might make it even more difficult for an ADA plaintiff to prove a substantial limitation in the ability to work.



allow more ADA plaintiffs with gastrointestinal illnesses to prove that they can perform the essential functions of their jobs with a reasonable accommodation, and thus experience more success in asserting their ADA claims.

In fact, some plaintiffs actually have been successful in arguing that "home work" should qualify as an acceptable form of a reasonable accommodation. In a case brought under the Rehabilitation Act, the United States Court of Appeals for the District of Columbia Circuit held that genuine issues of fact remained, and therefore summary judgment was inappropriate, in a case involving an individual with multiple sclerosis who requested to work at home.<sup>392</sup> In *Langon v. Department of Health and Human Services*, the plaintiff, a computer programmer, sued her former employer after she was denied a promotion and ultimately fired from her position.<sup>393</sup> Once the plaintiff exhausted her administrative remedies, she brought suit in the United States District Court for the District of Columbia.<sup>394</sup> The district court granted summary judgment in favor of the employer, and the plaintiff appealed.<sup>395</sup> In reversing the summary judgment, the D.C. Circuit found genuine issues of material fact about whether the plaintiff could have performed her job at home, and whether working at home was a reasonable accommodation.<sup>396</sup>

Although *Langon* does not stand for the proposition that working at home is *always* a reasonable accommodation, it demonstrates a court's willingness to at least consider this alternative. As technology improves, this option will become a greater possibility. Unfortunately for ADA plaintiffs, not all courts are as willing to explore this "home work" option when considering disability claims.<sup>397</sup> However, plaintiffs who must stay

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392. *Langon v. Dep't of Health and Human Servs.*, 959 F.2d 1053, 1054 (D.C. Cir. 1992).

393. *Id.* at 1054-56. As a result of her condition, the plaintiff was absent from work quite often, an issue that caused "disruption" at the plaintiff's place of employment. *Id.* at 1054. Eventually, because of her illness, the plaintiff requested several accommodations, including permission to work at home. *Id.* Although the plaintiff's supervisor granted some of the plaintiff's requests, he denied her the opportunity to work at home. *Id.* at 1055. The employer's personnel director was aware that in some circumstances working at home was considered a reasonable accommodation, but he claimed he needed additional information to determine whether the plaintiff was entitled to such an accommodation. *Id.* Despite receiving more medical information, the plaintiff's supervisor still denied her request, this time because the plaintiff's job was not one that lent itself to working at home. *Id.*

394. *Id.* at 1056.

395. *Id.* The district court's opinion can be found at 749 F. Supp. 1 (D.D.C. 1990).

396. *Langon*, 959 F.2d at 1060-61.

397. See, e.g., *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 446 (8th Cir. 1998) (deciding not to address whether an employer's denial of an employee's request to work at home constituted an ADA violation); *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544-45 (7th Cir. 1995) (holding that no reasonable jury could have concluded that working at home

home as a result of their disabilities and can efficiently and effectively work at home should continue to assert this as a reasonable accommodation for their disabilities. This is yet one more approach ADA plaintiffs can use to try to be successful in their cases.

## VII. CONCLUSION

Originally praised as a "landmark" piece of legislation, the ADA has not provided relief for many individuals who suffer from various "hidden" illnesses, including colitis and Crohn's disease. Although this Article focused on individuals with gastrointestinal disorders, plaintiffs with all types of illnesses have difficulty pursuing claims under the ADA. These plaintiffs fall into the all-too-common dilemma of either being "not sick enough" and therefore not having a disability under the Act, or being "too sick," and therefore not being a *qualified* individual with a disability under the ADA.

In order to improve their likelihood of obtaining some type of relief for the adverse employment actions caused by their illnesses, plaintiffs must pursue other potential avenues. One approach might encourage courts or Congress to expand the definition of disability, but that seems unlikely in light of the federal courts' opinions on this issue, and Congress' lack of a response in these pro-employer opinions. As a result, plaintiffs will either have to seek other federal remedies under laws such as the Family Medical Leave Act or the Social Security Act, or seek remedies under more favorable state laws that prohibit disability discrimination.

Another option ADA plaintiffs might pursue is to attempt to broaden the scope of what constitutes a reasonable accommodation under the ADA. Specifically, if ADA plaintiffs can convince courts and employers of the benefits of "home work," some ADA plaintiffs will be able to prove that they can perform the essential functions of their jobs with a reasonable accommodation. With increased technology, this alternative to a traditional workplace will protect some ADA plaintiffs who otherwise cannot attend work on a regular basis. This is especially true for people with colitis and Crohn's disease, who often must stay at home because of the effects of their illnesses.

As this Article has demonstrated, the ADA has been ineffective in helping individuals with "hidden" diseases such as colitis and Crohn's disease enter or remain in the workforce. Although this legislation certainly has opened some doors to people previously excluded from the workforce, the Act has left many others still looking for a way to enter the "bright new era of equality, independence, and freedom" President Bush promised

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was a reasonable accommodation, and acknowledging that employers are typically not required to grant such an accommodation).

when signing the ADA into law.<sup>398</sup> Unless and until Congress acts to change the pro-employer momentum created by the federal courts, or until the judicial hostility toward the ADA subsides, the likelihood that plaintiffs suffering from gastrointestinal disorders such as colitis and Crohn's disease will enter this "bright new era of equality" remains extremely remote.

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398. Bush, *supra* note 5. Bush called on the ADA to be the door to a "bright new era of equality, independence, and freedom" when he signed the ADA.